I. Overview

In *Kansas v. Garcia* the Court will address multiple questions of preemption regarding the prosecution of three people under a state identity theft law. Based on my analysis below, I recommend the Court hold that Kansas's prosecutions under its state laws were neither expressly nor impliedly preempted by the Immigration Reform and Control Act of 1986 (IRCA), and reverse the Kansas Supreme Court's ruling vacating the convictions.

The Court is asked to settle three primary issues. First, as a preliminary matter, whether the Respondents were prosecuted purely on the basis of identity theft or fraud, or whether the prosecution rested on a violation of the federal work authorization system. This determination will inform the more central preemption questions raised on which the Court granted *certiorari.* For reasons detailed below, I recommend the Court hold this prosecution is not about work authorization as that clearly was not the prosecution theory and it complicates the preemption analysis.

Next, the Court will next address whether Kansas's prosecution of the respondents for providing fraudulent information on tax forms were either expressly preempted by IRCA as the Kansas Supreme Court held, or impliedly preempted by IRCA through field or conflict preemption. Given the plain language and purpose of IRCA, I will recommend that the Court reject the express preemption claim. Additionally, because of the prosecution posture determination, the differences in purpose between federal and state efforts and the lack of a clear conflict or broad field, I recommend the Court also reject the implied preemption claims.

II. Facts and Procedural History

This case consolidates three Kansas convictions for identity theft that were vacated by the Kansas Supreme Court finding them preempted. *See State v. Garcia,* 401 P.3d 588 (Kan. 2017).

A. Legal Background

Following state efforts to get involved in alien work authorization, in 1986, Congress enacted IRCA, Pub. L. No. 99-603, 100 Stat. 3359, in part to reestablish federal authority over the regulation of employment to ensure "illegal aliens" could not obtain employment in the United States. *See* United States Amicus Br. 2-3. IRCA established a detailed verification system to enforce its ban on employment of "illegal aliens." 8 U.S.C. 1324a(b), *see generally* United States Amicus Br. 3. A key aspect of this system is the Form I-9 which verifies that an employee is authorized to work. *See* 8 U.S.C. 1324a(b)(1)(A). This form requires employers to confirm they have examined relevant pieces of identification for any employee, citizen or alien. Id. It also places a requirement that employees confirm their eligibility to work, 8 U.S.C. 1324a(b)(2), and creates civil and criminal penalties for the use of fraudulent documents to achieve authorization. *See* 8 U.S.C. 1324c(a); 18 U.S.C. 1546.

Most relevant to the present dispute are two key aspects of IRCA: (1) the limitations on the use of attestation forms, and (2) IRCA's broader explicit preemption clause. IRCA prohibits using the I-9 form and "any information contained or appended to [the I-9]" for any purpose other than enforcement of the Immigration and Nationality Act or other specified federal crimes. 8 U.S.C. 1324a(b)(5). Additionally, another clause more broadly preempts "any state or local law imposing civil or criminal penalties . . . upon those who *employ, or recruit, or refer for a fee for employment*, unauthorized aliens." 8 U.S.C. 1324a(h)(2) (emphasis added).

This case also implicates two criminal statutes in Kansas used to prosecute the Respondents. First, Kansas's identity theft statute was used to prosecute all three Respondents. It criminalizes the use of "personal identifying information" of another, intending "to defraud . . . in order to receive any benefit. Kan. Stat. Ann. § 21-6107(a)(1) (Supp. 2017). In the case of one

respondent, he was also prosecuted under the false information statute which prohibits (as relevant to this case) the writing of something with knowledge of its falsity with regards to a "material matter" and the intent to defraud. Kan. Stat. Ann. § 21-5824 (Supp. 2017). Nothing within either statute implies anything but general laws of neutral applicability, and neither is limited solely to the employment context. *See* United States Amicus Br. 6.

B. Kansas Prosecutions

Following state and federal investigations, all three respondents were prosecuted and convicted for identity theft under Kansas law for fraudulent use of another person's social security number on state tax withholding forms. One respondent was also convicted of making false statements. All three convictions were appealed under the theory before the Court.

The named respondent, Ramiro Garcia was stopped by a police officer for speeding in August 2012. Garcia was headed to his job at the time of the stop. Through a records check, the officers identified that he had previously been contacted about potential identity theft. Through a joint federal and state effort, officers determined that he had fraudulently used the social security number of a Texas woman to obtain employment as he did not have his own. Garcia was not charged federally, but Kansas proceeded to charge him under the state's identity theft law.

Another respondent, Donald Morales, was investigated by the Kansas Department of Labor for irregularities in the social security number he had used at his job. After an investigation, officers confirmed that he had used someone else's social security number to obtain employment and utilized that number on employment and tax withholding forms. He was charged under the same state identity theft law, as well as, under the state's false information act. The final respondent, Guadalupe Ochoa-Lara, was tried after a Department of Homeland Security and state police department investigation determined he had used a fraudulent social security number to

obtain a lease. Through the investigation, they found that he had used that social security number on tax withholding and employment verification forms. He was charged under the same law.

C. Procedural Development

All three respondents were convicted in initial trials under the identity theft law, with none of the convictions relying upon the I-9 form. Garcia and Morales's convictions rested on their K-4 (state tax withholding) and W-4 (federal tax withholding) forms. Ochoa-Lara's rested solely on his W-4 after charges based on his I-9 were dismissed under IRCA.

Each respondent appealed their convictions to the Kansas Court of Appeals. Each of them argued that the prosecution should have been preempted by IRCA because it relied upon information contained on their I-9 forms—even though the courts had relied solely upon information provided on separate forms as well for the convictions. Three separate panels rejected the claims, holding that the prosecutions were not preempted as they did not involve the Respondents' immigration status, nor their legal status in the country or employment eligibility.

The Kansas Supreme Court agreed to review all three convictions. In a divided opinion, a majority of the Court reversed the convictions, holding that the prosecutions were preempted under 8 U.S.C. § 1324(b)(5) because even though the prosecution did not rely upon the I-9, the information it relied upon was included in the I-9. The majority held that while the express preemption clause in IRCA was limited to employers, § 1324(b)(5) served as an "effective" express preemption on prosecution of employees. One justice concurred with the four-judge majority, but rejected the express preemption theory, relying upon an implied preemption theory.

Following the decision, the State of Kansas submitted a Petition for *Certiorari* to this Court to review the preemption questions, as well as a subsequent question of whether Congress had the constitutional authority to preempt state police power so broadly. After a first initial

conference, this Court invited the Solicitor General to submit a brief on behalf of the United States regarding the petition. After the petition was distributed for conference six additional times, the Court granted *certiorari* on solely the questions of preemption. Both parties, the Solicitor General of the United States, and multiple amicus curiae in support of both parties have briefed the case, which is scheduled for oral arguments on October 16, 2019.

III. Analysis

A. Theory of Prosecution

Before analyzing the preemption question, the Court should address the dispute over the posture under which the prosecutions were conducted, as this will be relevant to the preemption discussion. The petitioners have argued that the prosecutions were conducted solely as a matter of identity theft and fraud prevention under relevant state statutes. Pet'r Br. 4-5. Further, they argue that the question of whether it involves employment overall is not at issue, rather whether the "clear and manifest purpose of Congress" was to displace the police powers reserved to the states to prosecute the specific identity theft crimes. Reply Br. 1. There is no dispute that the prosecution did not rely upon I-9 forms. Pet'r Br. 5. The Respondent however argues that work authorization was the basis of the prosecutions, and that the prosecutions were successful solely for that reason. *Id.* 2. While both sides are compelling, based on past jurisprudence and key facts in this case, the Petitioner's contentions should likely win.

There is certainly merit to the Respondent's contention that the prosecution could not have moved forward absent the work authorization which occurred. Resp. Br. 24. As the Respondents correctly noted, both Kansas statutes require Kansas to prove that the fraud was conducted in order to acquire some "benefit." *See* Kan. Stat. Ann. §§ 21-6107(a)(1), 21-5824. Petitioners concede that the sole "benefit" received in these cases is the work itself and taxable income

received as a result of this work. Reply Br. 1. Thus, Respondents point to this fact as an indication that the prosecution itself was about work authorization. Resp. Br. 24. While compelling, it does not seem to withstand scrutiny. In its reply, Petitioners outline the flawed reasoning arguing that the Respondents have conflated hiring and work in general, with the narrower IRCA work authorization set up. Reply Br. 1-2. Petitioners raise two primary points here. First, IRCA says nothing about tax withholding forms in general, nor does it allow these forms to be appended to the I-9 supporting the idea that this prosecution is about stolen social security numbers, not employment verification fraud. *Id.* Further, Petitioner's point out that while related to employment generally, the convictions were not for using fraudulent information to obtain authorization; and just because the fraud helped achieve the benefit of employment does not transform the tax withholding fraud into a piece of the I-9 system. *Id.* 5-6. Thus, while the benefit is employment, the theory of prosecution remains one of stolen social security numbers, not employment verification fraud. This determination, while not specifically articulated as a separate issue, informs the discussions of express and implied preemption below.

B. Express Preemption

Express preemption analysis focuses on the plain text of the statute to determine whether Congress, through its Supremacy Clause power, has blocked states from enacting certain laws. In examining a question of express preemption, the focus of the inquiry is on the "plain wording" of the federal statute because it contains the most accurate evidence of "Congress' preemptive intent." *Whiting*, 563 U.S. at 594 (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Both parties and the United States rely on the plain text and structure of IRCA for the analysis, but the Respondent's argument falls short of persuading.

Respondents argue that the plain text and structure preempts the state prosecution, pointing to the federal crimes written into the statute, and the fact that the preemptive clause implies that the information on an I-9 *becomes* part of the federal employment verification process by virtue of being submitted on an I-9. Resp. Br. 32-35. The Respondents also point to the overall structure of the IRCA and argue that Congress contemplated potential fraud and that is why they incorporated federal fraud statutes as permissible prosecutions. *Id.* at 35. Petitioners counter through their own lengthy plain language analysis, pointing to the strained reading required to reach the Respondent's conclusions. Pet'r Br. 22-24. Petitioners also raise the convincing point that the Respondents did not even attempt to defend the novel "effective" express preemption theory relied upon by the Kansas Supreme Court given its lack of logic. Reply Br. 8. Further they point to the fact that there is nothing within the specific text that *expressly* precludes information entirely separate from the I-9 and its attachments and arguing that this limited scope is the only reading consistent with the text. *Id*. at 9-10. Finally, Petitioners raise the most compelling argument that under the Respondent's construction, individuals would essentially have what amounts to a get out of jail free card under state identity theft laws if they simply put any of the offending information onto an I-9 whether or not they needed to. *Id.* at 11-12.

This overall argument is supported by the United States' amicus brief, in which the government argues that the Kansas Supreme Court holding that these prosecutions utilized information "contained in" I-9s contradicts the plain meaning of the statute. United States Amicus Br. 11-12. The government goes on to illustrate this point by arguing that an ordinary person could not read that law to infer that information taken from an entirely separate document would be prohibited just because it also was included on the I-9. *Id.* at 12. Further, the United States argues that the forms used for the prosecution may, in practice, be submitted at the same

time as employment verification, they are submitted for entirely different purposes – echoing the distinction drawn above about the posture of the prosecution. *Id.* at 18-19. Finally, and convincingly, the government points to a litany of previous lower court rulings showing that nearly any court that has taken up this question before Kansas has found the preemptive clause only applies when an identity theft law is applied in a way relying specifically on the I-9 or its attachments. *Id.* at 16-17. The express preemption claim is the Respondents' weakest, and the combination of the United States and Petitioner's arguments lead me to believe express preemption does not apply. This is supported by the Respondents not adopting the express preemption rationale used below, highlighting the flimsiness of that holding. *See* Reply Br. 8.

C. Implied Preemption

When addressing implied preemption, there is an assumption against preemption when a historic police power of the states is potentially superseded absent the "clear and manifest purpose of Congress." *See Wyeth v. Levine*, 555 U.S. 555,565 (2009). Respondents contend that the prosecutions should also be impliedly preempted through both field and conflict preemption, because IRCA occupies the "field" of fraud in the federal employment verification system, and the Kansas statute "conflicts" with a comprehensive federal scheme. Resp. Br. 20. Both sides agree—and this Court has held—that IRCA was Congress establishing a "comprehensive framework" around the "employment of illegal aliens." *Arizona,* 567 U.S. at 404. The dispute arises over whether the prosecution falls within that framework.

Field preemption arises when (1) Congress establishes such a "pervasive" scheme of regulation that there is "no room" for States, or (2) where the "federal interest" is strong enough to infer preemption. *See id.* at 399 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). To be successful, the claim must establish (1) congress occupied the field, and (2) the

challenged state law is within that field. *See* United States Amicus Br. 22 (citing *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015)).

Regarding field preemption, Respondents contend that Congress has clearly occupied a space by creating a framework for "combatting the employment of illegal immigrants." Resp. Br. 42. They contended that this was a newly occupied space with IRCA, and that the law provides the federal government with exclusive authority over work authorization. *Id.* at 43. Further, they argue that Congress contemplated the potential for fraud within this comprehensive scheme and therefore included extensive criminal, and civil penalties available at the federal level. *Id.* They argue that IRCA governs the entire field because it is necessary to the success of the statute, saying that the entire process is part of a "single integrated and all-embracing system" *Id.* at 46.

Petitioners strongly counter the field preemption claims, arguing that if Congress has occupied any field, it is solely the I-9 work verification procedures, and this prosecution does not implicate a work authorization field. Pet'r Br. 19. The Petitioners argue that a preempted field only extends as far as is supported by "clear and manifest purpose of congress." Reply Br. 14 (quoting *Easterwood*, 507 U.S. at 663-64). Further, the petitioners point to the existence of other express preemptive language within IRCA and convincingly argue that this is evidence of Congress' limited and narrow preemptive intent. *Id.* at 15. The United States bolsters Petitioner's arguments by arguing the Respondent's proposed "field" draws a distinction between alien and citizen that is not actually present in the text. United States Amicus Br. 24-26. Finally, they point to the fact that this is irrelevant based on the discussion above and that even if the field is as Respondents contend, this prosecution would still not be preempted. *Id.* Due to the various different arguments raised, the Petitioner's and government's arguments are the most

compelling. Given the analysis of the posture of the prosecution above, not only is the proposed field incorrect, but even if it was correct this prosecution would still not enter that field.

Conflict preemption occurs when a state law imposes an "obstacle to the accomplishment and execution" of Congress's objectives. *See Arizona,* 567 U.S. at 406. The first potential for conflict preemption arises when it is impossible to comply with both the federal and state statutes, which neither side contends in the present case. Instead, Respondents argue that allowing these state prosecutions would create a conflict by frustrating the overall objectives of the federal enforcement regime. Resp. Br. 50-51. Further, Respondents argue that the federal government already created substantial criminal fraud crimes that are applicable to the I-9 system and allowing the states to create these duplicative laws could lead to conflict between the bodies. *Id.* This argument, however, does not withstand the scrutiny brought by the Petitioner and United States. First, Petitioner's rely heavily on the fact that Respondent's do not argue that there is an actual direct conflict with the laws, thus the only potential issue is if it creates such an obstacle that it frustrates the federal purpose. Reply Br. 19-20. In a nearly conclusive argument, Petitioner's point to the federal government itself which says this state prosecution does not frustrate any federal goal. *Id*. Petitioners also argue that that state prosecution of respondents for conduct outside the I-9 employment verification system impedes no federal interest. *Id.* at 21-22. These arguments are supported by two key arguments from the United States: (1) that the government itself is claiming zero frustration of federal purpose, and (2) that this dispute raises a separate issue from *Arizona* because this prosecution is purely for employee fraud, an area in which Congress made no "deliberate choice" against prosecution. United States Amicus Br. 29-31. Thus, the arguments against a conflict trump any potential arguments of a frustrated purpose.

D. Other Arguments

Unlike the United States' brief, which tracks the petitioner's arguments providing the federal government support for the state's positions, other amicus briefs provide helpful color but do not ultimately sway the recommended disposition. One such brief came from "Puente Arizona and others" who are organizations and clinics that were involved in litigating two cases cited heavily by both parties' briefs: *Puente Ariz. v. Arpaio*, No. CV-14-01356-PHX-DGC, 2017 WL 1133012 (D. Ariz. Mar. 27, 2017), and *State v. Martinez*, 896 N.W.2d 737 (Iowa 2017). These amici raise three primary arguments in their brief: (1) local officials in other states have misused this type of prosecution in order to conduct state level immigration actions, (2) the experience in Arizona and Iowa illustrate how this law is impliedly preempted, and (3) that ruling for the Respondents would not impede on state identity theft prosecutions. Puente Ariz. Amicus Br. 4-6.

While all three of these claims have merit, none would counteract the primary reasons why the Petitioner's arguments should win. *Puente Ariz.* presents a very compelling case that other officials have (potentially improperly) used laws like these identity theft statutes as a sort of end-around to target unauthorized workers and conduct quasi-immigration policy at the state level. *Id.* 6-11. While this is likely the case in many instances, the argument does not point to evidence that these prosecutions had anything to do with the considerations of targeting unauthorized workers or illegal aliens. Further, both cases cited presented key differences with the present case. In *Puente Ariz. v. Arpaio*, there was a clear systemic targeting of illegal immigrants backed by evidence of public statements by officials, whereas no similar systemic system is presented in Kansas. *Compare id.* 6-9 *with* Pet'r Br. 10-13. Similarly, in *State v. Martinez*, Martinez was granted a reprieve because she used a fictional name, so no actual harm was implicated, but in this case, all Respondents used real stolen social security numbers presenting the exact type of

harm which the statute sought to prevent. *Compare* Puente Ariz. Amicus Br. 9-11 *with* Pet'r Br. 10-13. Thus, the cited examples are not on point here.

Next, *Puente Ariz.* presents two arguments that rely heavily on the experiences in Arizona and Iowa which simply do not present the same facts as are relevant in the present controversy. While both Arizona and Iowa's statues may have been preempted because they involved more direct interference in immigration policy, the case here does not present that type of entanglement for the reasons cited above. *See* Puente Ariz. Amicus Br. 12. Further, while the brief raises compelling arguments that the rulings did not impede identity theft investigations in Arizona and Iowa, this policy argument does not negate the practical legal argument above.

IV. Recommendation

While a case can be made for a narrow, implied preemption holding, I recommend this Court take the most logical path and hold that Kansas' prosecutions were not preempted. Resultingly, I recommend this Court reverse the Kansas Supreme Court for a few reasons.

First, the basis for the majority holding of IRCA "essentially express" preemption runs counter to the idea of express preemption. While a state would likely be expressly preempted from instituting a law that punishes employers for employing unauthorized workers or from using I-9 forms as the basis for prosecution, *see* 8 U.S.C. 1324a(b)(5), these prosecutions are not of employers, and Respondents concede that the state did not rely on the I-9 form for its prosecutions. *See* Resp. Br. 10-11; *see also* Pet'r Br. 10-11. Further, even ignoring the illogical language essentially meaning the court found implied preemption, the reasoning still fails. Just because the benefit sought by the respondents was employment does not transform a state tax form or hiring form into part of the work authorization program. *See generally* Reply Br. 5-6.

Secondly, accepting the Respondent's arguments could lead to an absurd result. Notwithstanding the fact that this is an as-applied challenge, accepting this reasoning would invalidate many avenues of prosecution for states in a manner not intended by Congress. While Respondents persuasively point out that Petitioners and the United States have been unable to identify *any* prosecution that has been blocked in the last two years since the Kansas Supreme Court ruling, Resp. Br. 39-40, the lack of such an occurrence to date does not undo the logic of the concern. Under this logic, IRCA would essentially invalidate prosecutions of fraud or identity theft overall because almost all information that could conceivably be used to commit identity theft is contained either on an I-9 form or attached documentation. *See* U.S.C. 1324a(b)(5). Taking this broader preemptive view is inconsistent with the intent of Congress and prior readings of the statute. *See Whiting,* 563 U.S. at 594; *Arizona*, U.S. at 405-07.

Further, upholding this ruling would be inconsistent with this Court's prior articulation of IRCA. Unlike in *Arizona v. United States*, where the Court invalidated laws specifically designed to involve the targeting of unauthorized workers, this statute is a neutral law of general applicability that would require a drastic expansion of the rationale in *Arizona* to invalidate. *See Arizona,* 567 U.S. at 401-07. While the benefit here acquired through identity theft is work, under the conceivable umbrella of IRCA, the application of the law is not based on an alien's registration status but on fraudulent use of a social security number. *Contra Arizona,* 567 U.S. at 400-01. The theory of the prosecution in this case—fraudulent use of a social security number for a job—is not analogous to the specific immigration enforcement statutes in *Arizona. Id.*

Finally, this result would lead to a situation where a citizen and "illegal alien" could commit the same identity theft or fraud under Kansas law, but only the U.S. citizen could be prosecuted. While the federal government sought to occupy the field of work authorization for aliens, no

party has advanced an argument that IRCA intended to protect "illegal aliens" from prosecution for identity theft under statutes that would penalize citizens. This absurd result undermines the premise that there was preemptive intent to invalidate laws like this. Accordingly, I recommend the Court take the path least disruptive state laws and reverse the Kansas Supreme Court.

V. Questions for Oral Argument

A. For Petitioner/Solicitor General

(1) When would it be preempted? Are you arguing that IRCA's preemptive effect for the prosecution of workers only extends to cases in which the prosecution relies upon fraud specifically on an I-9 form for the sole purpose of obtaining work authorization?

(2) This is simply an as applied challenge that would only bar prosecution in a substantially analogous. What is the harm in us ruling narrowly that these are preempted, while saying fraud used to procure another benefit, even if it also appears on the I-9, may be allowed?

B. For Respondent

(1) Under your rationale, if a citizen was an authorized worker but committed fraud on their application due to a past conviction that they feared would keep them from getting the job, would Kansas be able to prosecute them for this fraud if the false name was also on the I-9 form?

(2a) If yes, why would Congress draft a law, conceivably with the purpose of preventing "illegal aliens" from working that insulated them from certain prosecutions citizens could face?

(2b) If no, is it your contention that IRCA, a law designed with the intent to regulate alien's efforts to work in the U.S. was designed to preempt state prosecution, under state law, of a U.S. citizen for identity theft on a job application? Additionally, if that is the case, what is the constitutional authority for Congress to usurp state police power in this way? The Constitution is

clear in its grant of authority to the federal government to control naturalization proceedings, but this rationale would involve the federal government blocking state prosecutions of fraud.

VI. Conclusion

This court should reverse the Kansas Supreme Court's ruling that the petitioner's prosecutions were preempted by federal law, and remand for consistent proceedings.

Applicant Details

First Name	**Benjamin**
Middle Initial	**S**
Last Name	**Schwartz**
Citizenship Status	**U. S. Citizen**
Email Address	**benss@umich.edu**
Address	**Address** Street **4500 Park Verona** City **Calabasas** State/Territory **California** Zip **91302** Country **United States**
Contact Phone Number	**8189616267**

Applicant Education

BA/BS From	**University of California-Berkeley**
Date of BA/BS	**December 2015**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 7, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Journal of International Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Suh, Peter
petersuh@gmail.com
202-557-8941
Thronson, David
thronson@umich.edu
Koven, Lisa
daniel.dashewich@ice.dhs.gov

References

Lisa Koven:
lisa.koven@ice.dhs.gov
(202) 538-7237

Peter Suh:
petersuh@gmail.com
(202) 557-8941

Professor David Thronson: david.thronson@law.msu.edu
(517) 763-1126

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Benjamin Schwartz
4500 Park Verona
Calabasas, California, 91302
(818) 961-6267
benss@umich.edu

September 4, 2020

The Honorable Elizabeth Hanes
United States Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a third-year student at the University of Michigan Law School and am writing to apply for a 2021-2023 clerkship. I hope to have a career in public service and see a clerkship as a rewarding way to start on that path.

I am confident that I would be an asset to your chambers. Apart from my time before law school teaching English in Japan, I have interned every year since 2012 with the federal government. I recently finished my second summer as a law clerk for the Department of Homeland Security, where I assisted with the investigation and prosecution of individuals who are suspected of committing grave crimes overseas, including genocide. At the University of Michigan, I serve as a contributing editor for the *Michigan Journal of International Law* and spent last fall working at the Human Trafficking Clinic. This background has given me extensive experience researching and writing about a wide variety of legal topics, ranging from expungement of offenses to the basis for government shutdowns.

I have attached my resume, law school grade sheet, and a writing sample. I have also included letters of recommendation from Professor David Thronson, from my supervisor last summer, and from the head of my office this summer.

Thank you for your time and consideration.

Sincerely,

Benjamin Schwartz

Benjamin S. Schwartz

benss@umich.edu; (818) 961-6267; 4500 Park Verona, Calabasas, CA 91302

Education

University of Michigan Law School — **Ann Arbor, Michigan**
Juris Doctor — **Expected May 2021**
Activities: Contributing Editor, *Michigan Journal of International Law*

University of California, Berkeley — **Berkeley, California**
Bachelor of Arts in Political Science and History (Minor) — **December 2015**
Activities: Research assistant for five semesters, Olive Tree Initiative

Work Experience

Department of Homeland Security, Human Rights Violators Law Division — **Washington, D.C.**
Law Clerk — **June to August 2020**
- Prepared prosecution memos in connection with investigations of human rights violators
- Performed legal and historical research on the Rwandan genocide and crimes of the Saddam Hussein regime

Department of Homeland Security, Cybersecurity and Infrastructure Security Agency — **Washington, D.C.**
Law Clerk — **June to August 2019**
- Wrote memos on CISA's authorities, government shutdowns, international trade law, and cyberlaw developments
- Briefed agency principal on high-profile case, prepared declaration for FOIA litigation

NOVA — **Niigata, Japan**
English Teacher — **April 2016 to April 2018**
- Instructed students of all ages and abilities in one-on-one and group settings
- Created material for educational lessons

Embassy of the United States — **Yangon, Myanmar**
Public Affairs Intern — **June to August 2015**
- Helped organize events ranging from a conference on drug abuse to youth activities at the American Center
- Reviewed and interviewed applicants for exchange programs including the Fulbright Scholarship
- Wrote social media posts and regular reports on office activities, edited the daily press summary

Embassy of the United States — **Athens, Greece**
Political Section Intern — **January to April 2014**
- Worked to improve outreach to the Hellenic Parliament by identifying key MPs
- Wrote daily and weekly news updates, summarized cables

State Department, Office of International Religious Freedom — **Washington, D.C.**
Intern — **June to August 2013**
- Prepared drafts of policy recommendations, briefing binders for principals, and templates for congressionally-mandated reports
- Summarized cables, performed administrative tasks

Office of Alex Neil MSP, Cabinet Secretary for Health and Wellbeing of Scotland — **Edinburgh, UK**
Intern — **January to May 2013**
- Wrote research briefs and press releases
- Assisted with constituency casework, administrative tasks

Additional

Languages: Japanese (Basic)
Interests: Role-playing games, foreign affairs, military history

Benjamin Schwartz
The University of Michigan Law School
Cumulative GPA: 3.31

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Charles Silver	B	4	
Contracts	Bruce Frier	B+	4	
Legal Pract:Writing & Analysis	Timothy Pinto	S	1	
Legal Practice Skills I	Timothy Pinto	S	2	"S" stands for satisfactory.
Torts	Christina Whitman	B	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Law	Scott Hershovitz	A-	4	
International Law	Monica Hakimi	B+	4	
Intro to Constitutional Law	Samuel Bagenstos	B+	4	
Legal Practice Skills II	Timothy Pinto	S	2	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Daniel Deacon	B+	4	
Human Trafficking Clinic	Danielle Kalil	B+	4	
Human Trafficking Clinic: Seminar	Danielle Kalil	B+	3	
Immigration and Nationality	David Thronson	A-	3	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Procedure Survey	Eve Brensike Primus	Pass	4	
Evidence	Richard Friedman	Pass	4	
Mini-Seminar: Fake News? Beyond the Headlines/ Immigration Crisis	Elizabeth Campell	Pass	1	
Property	Carl Schneider	Pass	4	

The University of Michigan instituted mandatory pass-fail this semester because of the coronavirus.

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Copyright	Jessica Litman		4	
Corporate Compliance: Policy and Practice	Teresa Mosley Sebastian		2	

Environmental Law and Policy	Nina A. Mendelson	4
International Trade Law	Donald H. Regan	3

September 04, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to highly recommend to you Benjamin Schwartz for a clerkship. Ben was an intern with the Cybersecurity and Infrastructure Security Agency Office of the Chief Counsel during the summer of 2019. We found him to be very mature, intelligent, and reliable, especially considering it was only the summer after his 1L year of law school. His engagement with the office as well as with the clients was more on par with young attorneys a few years removed from law school.

As a summer intern, Ben was asked to work on a variety of projects and issues and he consistently delivered timely and stellar work. At the time, the agency was in the middle of cybersecurity supply-chain related litigation and Ben provided excellent research and summaries of relevant caselaw that proved to be quite helpful. He also drafted summaries of cybersecurity related podcasts where he was able to capture the most salient points and reduce them to digestible bullet points. Ben's acumen and maturity was highlighted again when he wrote up an excellent memo for the Chief Counsel on a U.K. cybersecurity case involving a major U.S. corporation. Together, they briefed the Deputy Director of the agency.

In addition to Ben's substantial legal abilities, what impressed us at OCC most was his maturity, collegiality, and witty sense of humor. He was a valued member of the team and the fact that many senior attorneys asked for his involvement in their projects is a testament to the value he added.

In short, I strongly recommend Ben to you and have no doubt he would be a wonderful addition to your chambers. If I can be of any further assistance in your review of his application, please do not hesitate to contact me.

Sincerely,

Peter Suh

Senior Counsel for Administrative Law

Office of the Chief Counsel

DHS Cybersecurity and Infrastructure Security Agency

Peter Suh - petersuh@gmail.com - 202-557-8941

MICHIGAN LAW
UNIVERSITY OF MICHIGAN

DAVID B. THRONSON
Visiting Professor of Law

912 Legal Research
625 South State Street
Ann Arbor, Michigan 48109-1215
517-432-6916
thronson@umich.edu

May 30, 2020

Dear Judge:

I am writing in enthusiastic support of Benjamin Schwartz's application for a judicial clerkship.

At the University of Michigan Law School, Ben was my student in in a three-credit course on Immigration and Nationality in Fall 2019. This survey course forced students to immerse themselves in the statutory and regulatory thicket of immigration law, against a backdrop of fundamental constitutional questions and evolving policy. The material was voluminous and varied, with adjustments made along the way to account for ongoing administrative shifts and high profile litigation. We moved fast and Ben was always the best prepared student in class, by a wide margin.

Indeed, in a law teaching career spanning nearly 25 years, Ben stands out as the hardest working student I have ever taught. In the classroom, Ben was a positive and significant contributor, consistently thoughtful and mature. He was a regular at office hours, never to rehash material covered in class but always to push beyond it. Ben completed unassigned problem sets then came by to discuss his responses. Notably, Benjamin was not simply prepared to discuss the material of the day, but also routinely demonstrated that he had gone beyond simply digesting material to contemplate how it fit into the bigger picture. His comments often made connections across topics in the course and with other areas of law. His insights demonstrated an active mind and an inherent curiosity. These traits will serve him well as a judicial clerk.

I am confident now that Ben possesses the intellectual ability and maturity to excel as a judicial clerk. I know that is work ethic will make him an asset to any chambers. I am further confident that he will be a pleasure to work with and will adapt quickly and well to the unique setting of judicial chambers. I urge you to give his application your strongest consideration and to contact me if I can provide any further information at (517) 432-6916 or thronson@umich.edu.

Sincerely,

David B. Thronson
Visiting Professor of Law

Office of the Principal Legal Advisor
U.S. Department of Homeland Security
500 12th St., SW
Washington, DC 20536

U.S. Immigration and Customs Enforcement

August 26, 2020

Dear Judge:

It is with pleasure that I write this letter of recommendation on behalf of Benjamin Schwartz, who served as a law clerk with the Human Rights Violators Law Division (HRVLD) from May through August 2020.

Within U.S. Immigration and Customs Enforcement (ICE), HRVLD pursues cases involving individuals allegedly involved in acts of persecution and/or in war crimes, genocide, torture, extrajudicial killing, and violations of religious freedom. In this work, without question, Mr. Schwartz served as an asset to HRVLD and to the Human Rights Violator and War Crimes Unit (HRVWCU) of Homeland Security Investigations in addition to ICE's Enforcement and Removal Operations (ERO).

Mr. Schwartz received assignments ranging from traditional legal research and writing to projects that involved specific persecutor investigations and addressing broader related questions. For example, working closely with a Historian at HRVWCU, he collaborated with other law clerks on developing a document that addressed U.S. initiatives focused on atrocity prevention and the larger public policy framework surrounding these policies. The Historian noted that Mr. Schwartz's work represented an academic "review of guiding principles," which encompassed the scholarly research on the contributions to mass atrocities and the panoply of prevention theories. Another project involved addressing extrajudicial killings. HRVLD asked Mr. Schwartz to review and update our substantive legal outline in this area, and he revitalized this section significantly and elegantly for us. His development of additional expertise in this area led to another successful assignment, a product addressing how a chemical weapons attack on a village constituted acts of extrajudicial killings.

Mr. Schwartz also took on developing preliminary prosecution memoranda in multiple cases for various Regional Support Teams. This required him to find a way to efficiently synthesize a broad range of disparate materials—from HSI investigation reports, a plethora of agency e-mails, to notes from phone calls between agency officials—in order to produce an extremely detailed legal product. In two significant cases, Mr. Schwartz advanced the questions significantly by producing important products. Mr. Schwartz was also extremely effective on shorter projects involving substantive cases. For example, an attorney with HRVLD asked him to examine a detailed draft product involving prior repatriations by ERO. The assignment required legal quality control of the document in addition to addressing more recent repatriations that did not have an entry. Mr. Schwartz addressed the document's deficits by updating the document with excellent case summaries, establishing both the persecutory indicia and procedural history succinctly and accurately.

More broadly, the entire staff on HRVLD recognizes Mr. Schwartz's solid work ethic, professionalism, positivity, and sense of humor. He is gracious with attorneys, staff, and the other law clerks with the Office of Principal Legal Advisor. Thus, we support Mr. Schwartz in his future endeavors. If I may be of further assistance, please do not hesitate to contact me at (202) 732-5017.

Regards,

Lisa Koven, Chief
Human Rights Violators Law Division

MEMORANDUM

TO: Danielle Kalil
FROM: Benjamin Schwartz and James Sunshine[1]
DATE: November 1, 2019
RE: Abigail Henderson's Eligibility to Set Aside Her Remaining Misdemeanors

QUESTION PRESENTED

Abigail Henderson[2] originally had three misdemeanor convictions, including one for prostitution. Her prostitution conviction was set aside under MCL 780.621(4), Michigan's human trafficking victim set aside provision. Does this conviction still count against the two-misdemeanor maximum required to use MCL 780.621(1), Michigan's general set aside provision?

SHORT ANSWER

The set aside prostitution conviction very likely counts against the two-misdemeanor maximum. Although Michigan's legislators may have desired otherwise when they created the human trafficking victim set aside provision, a court will consider their intent only if it finds the statute ambiguous, an unlikely scenario. The plain language of the statute, relevant caselaw, and related statutes both from Michigan and other states indicate that Abigail is not eligible to set aside her remaining convictions.

FACTS

Abigail was discovered by police after overdosing on heroin and received a misdemeanor conviction for controlled substance use on July 23, 2011. Next year, struggling to financially support herself, Abigail was advised by the individuals providing her with heroin to steal to support her habit. After a shoplifting attempt, Abigail received a misdemeanor conviction for third degree

[1] My clinic partner wrote some sections of the complete memorandum; I have included here only the sections I wrote.

[2] All identifying information, including the exact dates and nature of the offenses committed, has been changed to protect the client's anonymity.

retail fraud on September 21, 2012. In 2013, she began being trafficked and received a misdemeanor conviction for solicitation on December 4, 2013.

Recently, the Human Trafficking Clinic successfully set aside the solicitation misdemeanor using Michigan's human trafficking victim set aside provision. Abigail has asked us to determine whether she is eligible to set aside her two remaining misdemeanors.

DISCUSSION

Barring a highly sympathetic judge, Abigail will not be able to set aside her two remaining misdemeanors. MCL 780.621(1)(b) says "a person who is convicted of not more than 2 misdemeanor offenses and no other felony or misdemeanor offenses may petition the convicting court or the convicting courts to set aside 1 or both of the misdemeanor convictions." Abigail's set aside conviction almost certainly still counts against this limit.

Courts will consider legislative intent only if they first determine that the statute is ambiguous. It would be very difficult to show ambiguity here. First, the plain language of the statute gives no indication that convictions set aside under the human trafficking victim provision (section 4) are treated differently than convictions set aside under the general set aside provision (section 1). Second, the legislative history shows no clear intention to treat them differently.[3] Third, caselaw has found that the statute is clear, that set aside convictions count against the limit, and that when the legislature uses language that the courts have previously interpreted, there is a presumption that the legislature used that language considering the courts' interpretation. Finally, many other states have distinguished between general and human trafficking victim set aside provisions in a way that Michigan has not.

[3] This section was written by my clinic partner, and so I have not included it. He also wrote the first section, which discussed how courts interpret ambiguous language, as well as the conclusion.

***

II. The Plain Language of the Statute Strongly Indicates that Abigail's Set Aside Conviction Still Counts Against the Limit

MCL 780.621(1)(b) says "a person who is convicted of not more than 2 misdemeanor offenses and no other felony or misdemeanor offenses may petition the convicting court or the convicting courts to set aside 1 or both of the misdemeanor convictions." MCL 780.621a(a) defines a conviction as "a judgment entered by a court upon a plea of guilty, guilty but mentally ill, or nolo contendere, or upon a jury verdict or court finding that a defendant is guilty or guilty but mentally ill." Abigail pled guilty to three misdemeanors. Because Abigail has been convicted of three misdemeanors, a plain reading of the statute says that she is not eligible.

At first glance, the situation seems to become more ambiguous when examining MCL 780.622. MCL 780.622(1) says "Upon the entry of an order under section 1 [MCL 780.621], the applicant, for purposes of the law, shall be considered not to have been previously convicted, except as provided in this section and section 3 [MCL 780.623]." This expansive language seems to suggest that a set aside conviction would not count against the limit. After all, the general set aside provision says "is convicted," and people with a set aside conviction are "considered not to have been previously convicted."

However, one of those exceptions in section 3 is crucial. MCL 780.623 says that the record of a set aside conviction will still be available to the authorities for several purposes. This includes subsection 2: "To show that a person who has filed an application to set aside a conviction has previously had a conviction set aside under this act." This language initially looks ambiguous as well. Originally, Michigan's general set aside provision was useable only by people who had a

single misdemeanor or felony offense.[4] The language in MCL 780.623(2) has not substantially changed from that time. Therefore, it was written to govern the following situation: a person commits one offense, sets it aside, commits another crime, and tries to set aside that new offense.

In this situation, MCL 780.623(2) seems to have two possible meanings, and even though the law has changed since then, determining which is correct sheds much light on Abigail's case. It could mean that the first set aside offense would be something for the court to consider when deciding whether or not to grant a second set aside. Under this reading, Abigail is eligible to set aside her remaining convictions because her previously set aside misdemeanor would just be a relevant factor. Alternatively, MCL 780.623(2) could be a total bar on granting a second side aside, in which case Abigail is similarly ineligible.

Unfortunately for her, another part of the set aside statute, MCL 780.624, and case law clear up the situation. Together, they indicate that any set aside conviction (whether under the general or human trafficking victim section) counts towards the two-misdemeanor maximum.

MCL 780.624 in its entirety reads "Except as provided in section 1, a person may have only 1 conviction set aside under this act." Today, it is a vestigial statute since section 1 allows for multiple convictions to be set aside. The language "except as provided in section 1" was added in the same law that introduced the human trafficking victim provision, Act No. 335 of 2014. The law thus previously said "A person may have only 1 conviction set aside under this act."

This clarifies the meaning of MCL 780.623(2), the part of the statute providing that records of set aside convictions are still available to the authorities. It was created during a situation where the set aside provision was available only to someone "who is convicted of not more than 1

[4] The language was "Except as provided in subsection (2), a person who is convicted of not more than 1 offense may file an application with the convicting court for the entry of an order setting aside the conviction." Subsection (2) listed offenses that could not be set aside. This older language is found here: http://www.legislature.mi.gov/documents/2001-2002/billengrossed/Senate/pdf/2001-SEBS-0927.pdf

offense" and where the set aside provision could be used only once. Therefore, the only possible reason why the government would retain a record of a set aside conviction in order "To show that a person who has filed an application to set aside a conviction has previously had a conviction set aside under this act" is to show that an applicant is ineligible because they had already used it.

Michigan's legislature has shown no intention to change this meaning. MCL 780.623(2) actually was changed by the same law that introduced the two-misdemeanor and one-felony maximum. Moreover, this law was passed after the human trafficking provision was introduced. Compare:

Before: To show that a person who has filed an application to set aside a conviction has previously had a conviction set aside pursuant to this act.

After: To show that a person who has filed an application to set aside a conviction has previously had a conviction set aside under this act.

The legislature changed "pursuant to" to "under." The fact that the legislature addressed this specific statute, but left it essentially unchanged while simultaneously altering other aspects of the law in a more significant way seems to indicate that the important change – the shift from a single-offense limit to a two-misdemeanor and one-felony maximum – would take place under the umbrella of the established statutory regime. Again, this reform happened *after* the human trafficking victim provision was introduced. Yet, the legislature did not change MCL 780.623(2) in a way that acknowledges its existence.

Of course, there are important differences between section 1 and section 4, the general and human trafficking set aside provisions. Section 4 has no waiting period and no cap on the number of offenses it can be used for. But looking at the plain language of the statute and considering the order in which it was written, the end result is the same. A set aside is a set aside. As discussed

below, the legislative intent may very well have been different. However, there is nothing in the statute itself suggesting that convictions set aside under section 4 do not count against the section 1 limit.

***

IV. Case Law Strongly Indicates that Abigail's Set Aside Conviction Still Counts Against the Limit

Although there is some helpful legislative intent, Michigan case law makes it very difficult to argue that convictions set aside under section 4 do not count against the section 1 limit. First, the Michigan Court of Appeals has held that the set aside statute is clear. Second, the Michigan Court of Appeals has held that set aside convictions still count against the limit. Third, the Michigan Supreme Court has held when the legislature uses language that the courts have previously interpreted, there is a presumption that the legislature used that language considering the courts' interpretation.

The Set Aside Statute is Clear

The Michigan Court of Appeals held that the set aside statute is clear in a case where a man tried to set aside two convictions arising from the same incident. *People v. McCullough,* 221 Mich. App. 253, 256 (Mich. Ct. App. 1997). This was when there was a one-offense maximum. The applicant argued that convictions arising from the same incident could be treated as one offense for the purpose of the set aside provision. The court disagreed. It noted that "Throughout the act, the Legislature refers to setting aside 'the' conviction" and that MCL 780.624 says that people "may have only one conviction set aside under" the act. *Id.* at 257. The court said "We consider this language to be clear, unambiguous, and a reflection of the legislative intent to allow only a single conviction to be expunged." *Id.* at 255. Because the legislature did not explicitly alter the

definition set forth by the court in *McCullough*, it is likely that the court's definition from *McCullough* remains binding. Despite the post-*McCullough* reforms to the statute, it has not changed radically. For example, instead of "the offense," it says "the felony offense" and "the misdemeanor convictions." Despite the law being somewhat more ambiguous than before, a plain language reading of the statute is still clearly available. Therefore, a reviewing court could easily cite *McCullough* in holding that the law is unambiguous.

Set Aside Convictions Still Count Against the Limit

Moreover, under Michigan case law, convictions that are set aside still count against the section 1 maximum. The question arose when a Michigan resident tried to set aside his single offense, again at a time when there was a one-offense maximum. *People v. Van Heck*, 252 Mich. App. 207 (Mich. Ct. App. 2002). He previously had five misdemeanors in Connecticut, which although out of state would normally count under Michigan's set aside conviction limit. However, Van Heck received a pardon for these offenses in Connecticut. The Michigan government opposed his set aside application, arguing that he obviously had been convicted of more than a single offense. The court disagreed, comparing the "continuing legal disabilities" of people with set aside convictions in Michigan with the more sweeping effects of the Connecticut pardon. *Id*. at 215. Crucially, the court accepted without argument the state's claim that set aside convictions still count against the maximum. This is so central to the court's reasoning that it cannot be dismissed as mere dicta.

It should be noted that *Van Heck* has some positive language. The court said its conclusion "accords with the liberal construction afforded statutes that are remedial in nature." *Id.* at 217. Unfortunately, given the paucity of the evidence arguing that convictions set aside under section

4 should be treated differently than those set aside under section 1, even a liberal construction is unlikely to be enough for Abigail.

Advocates for Abigail could also try to argue that *McCullough* and *Van Heck* should not be binding on her case because they were decided before the introduction of section 4, the human trafficking victim set aside provision. But because the Michigan legislature has not otherwise given any meaningful indication that convictions set aside under section 1, the general set aside provision, versus section 4 should be treated differently, convincing a court to distinguish them would be an uphill battle.

Judicial Decisions Are Considered to Impact the Legislature's Choice of Words

The final relevant case does not specifically address the set aside statute, but is important nonetheless. In the old but still cited case of *People v. Powell*, the Michigan Supreme Court held that a man who informally sold milk to several of his friends and neighbors was not covered by a statute that required a license for selling milk to "the public." *People v. Powell*, 280 Mich. 699, 707 (1937). In examining the meaning of "the public," the court said "[w]here the language used has been subject to judicial interpretation, the legislature is presumed to have used particular words in the sense in which they have been interpreted." *Id.* at 703.

This makes *Van Heck* still relevant. Its holding is that set aside convictions count against the limit while pardoned convictions (at least, convictions pardoned in Connecticut) do not. Despite this, the legislature used the same language (set aside) for dealing with the convictions of human trafficking victims. Although it is almost certainly a legal fiction that the Michigan legislature considered *Van Heck* when drafting section 4, without an explicit statement from the legislature to the contrary, it is a binding legal fiction. Set aside convictions are set aside convictions.

In short, while distinguishable in some respects, the case law is overall negative for Abigail.

V. Comparing Michigan to Other States Further Suggests that Abigail's Set Aside Conviction Still Counts Against the Limit

Just how Michigan could have distinguished between section 1 and section 4 becomes apparent when looking at the rest of the country. Most states with set aside provisions for human trafficking victims have clearly distinguished between what happens with convictions set aside under them versus convictions set aside under general set aside provisions. Because Michigan has not, it would be difficult to argue that convictions set aside under its general and human trafficking victim provisions should be treated differently.

Nearly every state allows offenders to set aside, expunge, seal, annul, or vacate their convictions.[5] *50 State Comparison Judicial Expungement, Sealing, and Set Aside*, COLLATERAL CONSEQUENCES RESOURCE CENTER, http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/ (last visited Nov. 1. 2019). 37 states have provisions for human trafficking victims.[6] *Id.* Of those, 23 distinguish between what happens with convictions set aside under them versus convictions set aside under general set aside provisions. *Id.* Those states not only seal the records from the public eye, but vacate the underlying conviction, which their general set aside provisions do not.

Take New York as an example. Its general aside provision says "A defendant who has been convicted of up to two eligible offenses but not more than one felony offense may apply to the court in which he or she was convicted of the most serious offense to have such conviction or

[5] Alabama allows expungement only for victims of human trafficking, Maine allows sealing of records only for minors, and Virginia has nothing at all.

[6] This includes Utah, which has a provision for victims of "force, fraud, or coercion."

convictions sealed." N.Y. CRIM. PROC. LAW § 160.59(2)(a). By contrast, its human trafficking set aside provision says "At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that…the defendant's participation in the offense was a result of having been a victim of sex trafficking."[7] N.Y. CRIM. PROC. LAW § 440.10.

Michigan is a minority in another fashion. Michigan is one of only 16 states that have a maximum number of offenses requirement to use its general set aside provision.[8] *50 State Comparison*. The mere fact that it has a limit shows that the Michigan legislature has not intended it to be available for everyone.

In short, Michigan has gone against the grain both by setting a hard cap and by failing to distinguish between what happens with convictions set aside under the general as opposed to human trafficking victim provisions. This makes it even more challenging to argue that Abigail's set aside conviction should not count against the limit.

[7] Labor trafficking is also included in other parts of the statute.

[8] The idiosyncrasy of the states makes it hard to specify the exact number. This figure includes states like Montana, which allows only a single set aside application that includes multiple convictions, but excludes Louisiana, which requires a single expungement once every five years.

Applicant Details

First Name	**Jacqueline**
Middle Initial	**W.**
Last Name	**Scott**
Citizenship Status	**U. S. Citizen**
Email Address	**jacqueline.w.scott@gmail.com**
Address	**Address** Street **2123 Saint Albans Street, Apt 2** City **Philadelphia** State/Territory **Pennsylvania** Zip **19146** Country **United States**
Contact Phone Number	**7124412064**

Applicant Education

BA/BS From	**Vanderbilt University**
Date of BA/BS	**May 2016**
JD/LLB From	**Vanderbilt University Law School** **http://law.vanderbilt.edu/employers-cs/judicial-clerkships/index.aspx**
Date of JD/LLB	**May 10, 2019**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Bass Berry & Sims Moot Court Competition**

Bar Admission

Admission(s)	**Pennsylvania**

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Miller, Spring
spring.miller@vanderbilt.edu
615-875-9860
Lindy, Jeffrey
jeffrey.lindy@phila.gov
267-271-6598

References

Kevin M. Stack
kevin.stack@law.vanderbilt.edu
615.343.9220 (office)

Spring Miller
spring.miller@vanderbilt.edu
615.875.9860 (office)

Jeffrey M. Lindy
jeffrey.lindy@phila.gov
215.686.6302 (office)
267.271.6598 (cell)

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jacqueline W. Scott
2123 Saint Albans Street
Philadelphia, PA 19146

August 31, 2020

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III and Robert R. Merhige, Jr. Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am an assistant district attorney for the City of Philadelphia writing to apply for a clerkship in your chambers beginning in August 2021. I graduated from Vanderbilt Law School in 2019 and Vanderbilt University in 2016. I am applying to your chambers because I was drawn to your background in criminal and civil litigation. I would like to learn from a judge with your experience in writing for trial practice. Also, I am eager gain exposure to federal litigation in the district's varied, fast-paced docket while establishing ties to Virginia.

As an assistant district attorney in Philadelphia's busy criminal courts, I manage a heavy case load that demands efficient work under tight deadlines. I regularly perform legal research and analysis for felony preliminary hearings, misdemeanor trials, and various motions. During law school, opportunities to work in a federal district judge's chambers and a U.S. Attorney's Office allowed me to hone my skills in research and writing for trial practice. I am eager to apply these experiences during a clerkship and to further develop my skills in legal research, writing, and analysis.

I am also interested in clerking because of my dad, who is a senior judge on the Iowa Court of Appeals. When I was growing up, my dad and I frequently discussed his work as a state-level trial judge – this was normal dinner table conversation, and it excited me. This is just one of the reasons I am eager to engage in legal discussions in chambers.

My application materials include my resume, writing sample, law school transcript, and letters of recommendation from Dean Spring Miller of Vanderbilt Law School and Jeffrey Lindy of the Philadelphia District Attorney's Office.

Please contact me if you would like any additional information. I can be reached by phone at 712.441.2064 or email at jacqueline.w.scott@gmail.com. Thank you for your consideration.

Respectfully,

Jacqueline W. Scott

JACQUELINE W. SCOTT

2123 Saint Albans Street, Philadelphia, PA 19146 · 712.441.2064 · jacqueline.w.scott@gmail.com

EDUCATION

VANDERBILT UNIVERSITY LAW SCHOOL May 2019
Doctor of Jurisprudence | 3.415
Honors and Activities: Intramural Moot Court Competition, Participant; Research Assistant; Hyatt Student Activities Fund Board, Co-Chair; University Appellate Review Board, Member; Co-Counsel Peer Mentor; Summer International Law Study in Venice, Italy.

VANDERBILT UNIVERSITY May 2016
Bachelor of Arts in American Studies, Sociology, minor in Vocal Performance, *cum laude* | 3.814
Honors and Activities: Dean's List, Spring 2013 – Spring 2016; Top 20 Outstanding Senior; Undergraduate Honor Council, Vice President; Vanderbilt Chorale, Section Leader; First-Year Mentor.

EXPERIENCE

PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, *Philadelphia, PA* September 2019 – Present
Assistant District Attorney, Trial Division. Handle large and varied criminal docket. Independently prepare 50-75 new cases per week. Conduct felony preliminary hearings (including bail motions) and misdemeanor trial proceedings (various motions and bench trials). Engage in courtroom oral advocacy on near-daily basis. Conduct anticipatory legal research for oral motions and arguments. Correspond efficiently with large number of victims, colleagues, police, and opposing counsel.

NASHVILLE DISTRICT ATTORNEY'S OFFICE, *Nashville, TN* January – May 2019
Law Clerk. Assisted experienced ADAs assigned to felony criminal courtroom prepare for daily courtroom proceedings and trials. Completed hearing and trial preparation tasks and conducted violation of probation and sentencing hearings under limited license supervision.

U.S. ATTORNEY'S OFFICE – MIDDLE DISTRICT OF TENNESSEE, *Nashville, TN* June – November 2018
Law Clerk. Drafted legal memoranda and motions on various substantive and procedural issues. Drafted responses for emerging criminal procedure questions created since *Sessions v. Dimaya.* Drafted response to sex offender's motion to modify conditions of supervised release.

BAKER, DONELSON, BEARMAN, CALDWELL, & BERKOWITZ, *Nashville, TN* May – June 2018
Summer Associate. Drafted legal memoranda and motions. Observed client calls and meetings, including mediation sessions. Drafting response motion to complex attorney-client privilege issue.

PROFESSOR KEVIN M. STACK, *Nashville, TN* August – December 2017
Research Assistant. Researched positive law codification procedures. Engaged in in-depth comparison of statutory provisions before and after codification. Drafted memorandum of findings.

U.S. DISTRICT COURT – SOUTHERN DISTRICT OF IOWA, *Des Moines, IA* July – August 2017
Judicial Intern to Chief Judge John A. Jarvey. Researched substantive and procedural issues. Drafted an order affirming entry of default and directing parties on proper service under The Hague Service Convention and an order granting a motion to intervene in a class action.

SKILLS AND INTERESTS

Running and cycling, cooking and baking, listening to and performing classical music.

Admitted to Pennsylvania Bar

Jacqueline Scott
Vanderbilt University Law School
Cumulative GPA: 3.415

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Suzanna Sherry	B	4	
Contracts	Tracey George	B+	4	
Legal Writing I	Jennifer Swezey	A-	2	
Life of the Law	Tracey George & Edward Cheng	P	1	
Torts	Sean Seymore	B	4	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law I	Timothy Meyer	B+	3	
Criminal Law	Nancy King	B+	3	
Legal Writing II	Jennifer Swezey	A-	2	
Property	Daninel Sharfstein	B+	4	
Regulatory State	Kevin Stack	A-	4	

Summer 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Comparative Perspectives on Counter-Terrorism	Michael Newton	A	2	
European Union Law	Kevin Stack	A	2	
International Arbitral Process	Fabrizio Marrella	A	2	
Transnational Litigation	Ingrid Wuerth	A-	2	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Administrative Law	Kevin Stack	B+	3	
Constitutional Law II	Sara Mayeux	B	3	
Crim Pro: Investigation	Christopher Slobogin	B	3	
International Trade Law	Timothy Meyer	B+	3	
Moot Court Competition	Susan Kay	P	1	
Research Assistant	Kevin Stack	P	1	

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Procedure: Adjudication	Nancy King	B	3	

Employment Law	Jennifer Shinall	A-	3
Evidence	Edward Cheng	B	4
Family Law	Jenny Cheng	A-	3

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Corporations & Business Enterprises	Morgan Ricks	B	4	
Reproductive Rights & Justice	Ellen Clayton	A	2	
Trial Advoacy	Wendy Tucker & James Mcnamara	P	3	
White Collar Crime Seminar	Nancy King	A-	3	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Evidence & Trial Advocacy (Criminal)	William Cohen & Richard McGee	A	2	
Education Law	Jenny Cheng	B+	3	
Evidentiary Challenges	Sara Myers	P	1	
Externship (In Nashville)	Susan Kay & Spring Miller	P	3	
Public Lawyer: Professional Responsibility & Practice	Spring Miller	A	3	

Grading System Description
4.0 Grade System. Vanderbilt Law does not rank students.

August 26, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend Jacqueline Scott for a clerkship in your chambers. I came to know Ms. Scott well during her last year at Vanderbilt Law School, when she was a student in two of my classes. Ms. Scott impressed me mightily with her intellectual energy and capacity, her professionalism, and her commitment to public service. I am confident she will make an outstanding judicial clerk.

During spring semester 2019, Ms. Scott enrolled in two classes I teach: The Public Lawyer, a course on the legal profession and the laws governing the conduct of attorneys, and the in-Nashville externship seminar, the classroom portion of a course that enables students to earn academic credit for unpaid legal work they perform in an external law office. Ms. Scott's externship site was the Metro Nashville District Attorney's office. Both the Public Lawyer and the externship course serve as a form of a bridge to the world of practice, enabling students to consider the work of lawyers and their role in our legal system through an academic lens as they prepare to enter the profession themselves. From her participation in these relatively small, discussion-heavy classes, I got a very good sense of who Ms. Scott is as a person and as an aspiring attorney. I became familiar with her commitment to public service, her deep interest in litigation, her strong ethical compass, and her intellect. It was truly a joy to watch her find her passion for prosecutorial work through her externship site experience while she simultaneously immersed herself in classroom study of the unique ethical and legal complexities of the role of prosecutors in the U.S. legal system.

Ms. Scott impressed me greatly on several fronts with her performance in the reflective and classroom portions of the externship course. First, she is a thoughtful and highly engaging writer. Of the many students' journals I have read in my role as faculty externship supervisor over the past several years, Ms. Scott's were among the most substantive, thoughtful, and reflective.

Ms. Scott is not just a gifted writer, however – she has excellent analytical skills that will serve her well as a clerk in chambers and throughout her legal career. She is intellectually curious, thinks problems through carefully and deeply, and it was clear from her oral and written reflections that she was determined to use her externship experience to strengthen her litigation and advocacy skills and to develop a deeper understanding of the criminal justice system. She thrived in the live practice setting of the Nashville District Attorney's Office, and she particularly enjoyed having the opportunity to appear in court on behalf of the state in pre-trial hearings. Her site supervisor in that office was impressed with her work, saying she was a confident public speaker and very professional in the courtroom.

The Public Lawyer is a class about both the law governing the conduct of lawyers and about the norms, values, structure, history, and organization of the legal profession itself, with a particular emphasis on the public sector. The course is structured in a way that encourages student participation, discussion, and reflection about the roles of attorneys in a range of practice settings. From the outset of the semester, Ms. Scott stood out amongst her peers for the clarity of thought and analysis she displayed in her written reflections and contributions to class discussions. She quickly grasped the substantive legal concepts we covered, which derived from a range of legal sources, from the rules of professional conduct to Sixth Amendment caselaw. Importantly, she was also able to identify and engage constructively with the moral and policy issues at play in our discussions of the roles of attorneys in the U.S. legal system generally and in particular practice settings. Her strong analytical abilities enabled her to see many sides of an argument, but she also clearly had her own ethical compass that was guiding her as she began to develop her own professional identity. Her class presentation on the role and ethical obligations of prosecutors was among the strongest in the class, as was her final paper on the history of victims' rights statutes.

With a year of prosecutorial experience now under her belt, Ms. Scott is eager to pursue a clerkship to deepen her understanding of the litigation process, particularly in the federal court system. Ms. Scott's father is a judge on the Iowa Court of Appeals, and she has grown up immersed in conversations about litigation, trials, and judicial decision-making. She aspires to serve the public in a U.S. Attorney's office one day, and knows that a clerkship will offer invaluable perspectives on the federal litigation process and the complex role prosecutors play in our criminal justice system.

Among the many outstanding law students I have had the opportunity to teach and mentor, Ms. Scott stands out for her passion for litigation, her intellectual curiosity, her professional and poise, and her commitment to public service. She will be an outstanding clerk, and I give her my highest recommendation. Please do not hesitate to contact me if I can provide further information to assist you in your hiring process. Thank you for considering her application.

Spring Miller - spring.miller@vanderbilt.edu - 615-875-9860

Sincerely,

Spring A. Miller
Assistant Dean for Public Interest, Lecturer in Law

Spring Miller - spring.miller@vanderbilt.edu - 615-875-9860

PHILADELPHIA
DISTRICT ATTORNEY'S OFFICE
THE WIDENER BUILDING
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499
(215) 686-8000

LAWRENCE S. KRASNER
DISTRICT ATTORNEY

Jeffrey M. Lindy
Supervisor of Clinical Programs & Trials
215.686.6302 (office)
267.271.6598 (cell)
Jeffrey.Lindy@phila.gov

June 12, 2020

BY ELECTRONIC MAIL ONLY

United States District Court
Law Clerk Application
c/o Vanderbilt University School of Law
clerkships@law.vanderbilt.edu

Re: Jacqueline W. Scott, Esquire
Candidate, U.S. District Court Judicial Law Clerk

Dear Your Honor:

It is my pleasure to provide you with a letter of recommendation in support of Jacqueline W. Scott's application for a law clerk position with your Court. Without hesitation, I can tell you that if hired, Ms. Scott's analytical abilities, work ethic, and strong character will make her an asset to your Chambers, exceeding the high standards already expected of a United States District Court judicial clerk.

In August 2019, after graduation from law school, Ms. Scott joined the Philadelphia District Attorney's Office. Along with the other three members of the training team, I am responsible for designing, organizing, and teaching the six-week training program during which new Assistants District Attorney study substantive Pennsylvania criminal law and procedure, and learn about trial practice in Philadelphia's Municipal Court, a high volume and high-pressure courthouse where literally thousands of cases are handled every year. After completing training, the ADAs spend their first year in Municipal Court conducting preliminary hearings for felony cases and misdemeanor trials. My supervision of the new ADAs continues as I accompany them to court and meet with them afterwards to provide feedback and critique, reviewing all aspects of their day's performance such as witness examinations and courtroom management techniques.

Due to my training and supervisory role at the DA's Office, I became very familiar with Ms. Scott's abilities during her first year at the Office. She has a keen intellect and often impressed me and the other supervisors with her legal research skills, case analysis, and courtroom advocacy. Ms. Scott quickly gained the respect of her colleagues by being diligent in her case preparation and observant in court, as well as cooperative and dependable. She also has the important – and all too rare – quality of good judgment, recognizing which of the countless difficult issues that arise every day she could resolve on her own and for which ones she needed to consult with a more senior ADA or supervisor. She is comfortable on her feet and cool under pressure.

Over the many months that I trained and supervised Ms. Scott, I never once saw her lose her composure or become flustered.

Ms. Scott also demonstrated an important trait that simply cannot be taught – resilience. The life of a first-year ADA in Philadelphia's Municipal Court is not easy. Because they were in court all day conducting hearings and trials, Ms. Scott and her colleagues worked late into the night after court and during the weekends to prepare their other cases. While in court, not only did she have to manage a constantly overwhelming case load, but she had to put on her cases relying on scared and sometimes uncooperative victims and witnesses, and in an oftentimes hostile and unforgiving courtroom environment. Ms. Scott never seemed to get discouraged and eagerly applied the lessons learned in court from one day to tackle the challenges of the next. I would have been impressed with Ms. Scott's resilience had she been a trial lawyer with many years of experience; the fact that she was a first-year attorney made her attitude and accomplishments even more remarkable.

Ms. Scott is a hard-working and conscientious young attorney at the beginning of what I am sure will be a very successful career. She possesses all of the attributes and characteristics to be an excellent judicial law clerk and a very fine lawyer.

Please do not hesitate contact me if you have any questions or require additional information about Ms. Scott's credentials.

Respectfully yours,

/s/

_____

Jeffrey M. Lindy, Esquire

JACQUELINE W. SCOTT
2123 Saint Albans Street, Philadelphia, PA 19146 · 712.441.2064 · jacqueline.w.scott@gmail.com

WRITING SAMPLE

Document: Legal memorandum on section 6105 (persons ineligible to possess firearms) of the Pennsylvania Uniform Firearms Act.

Description: I began drafting this memorandum when Philadelphia's courts closed due to the COVID-19 pandemic. In the absence of court proceedings, my unit created an internal reference bank of memos for issues we encounter frequently. Unlawful possession of firearms is one such issue. This memorandum is a resource for assistant district attorneys who conduct preliminary hearings for section 6105 offenses.

TO: MUNICIPAL COURT UNIT

FROM: ASSISTANT DISTRICT ATTORNEY JACQUELINE SCOTT

DATE: JUNE 2020

SUBJECT: PROSECUTING PERSONS INELIGIBLE TO POSSESS FIREARMS – A PRIMER FOR ASSISTANT DISTRICT ATTORNEYS CONDUCTING PRELIMINARY HEARINGS

I. INTRODUCTION

Cases charging violations of the Pennsylvania Uniform Firearms Act (the Act) are common in the Philadelphia District Attorney's Office. The Act governs the sale, transport, and possession of firearms in the Commonwealth. Section 6105 of the Act prohibits individuals with certain prior offenses from possessing firearms. For new assistant district attorneys in the Municipal Court Unit who conduct fast-paced preliminary hearings for felony cases, it is important to understand each piece of section 6105—the offenses that disqualify someone from firearms possession, how adult convictions versus juvenile adjudications affect ineligibility, and proper gradation of the offense.

The criteria for ineligibility to possess a firearm are formulaic and depend on the nature of the individual's prior convictions or combination of convictions. The gradation of any section 6105 charge depends on the nature of the underlying conduct and circumstances of the unlawful firearms possession. This memo provides an overview of section 6105 and describes how to make out a *prima facie* case of the offense at a preliminary hearing by covering what it means to "possess" a firearm, the conduct or offenses that make someone ineligible to possess a firearm, and when felony gradation is appropriate.

II. THE PENNSYLVANIA UNIFORM FIREARMS ACT

The United States and Pennsylvania Constitutions guarantee Pennsylvanians the right to bear arms. U.S. CONST. amend. II; PA. CONST. art. I, § 21. However, this right can be restricted "in the exercise of the police power for the good order of society and the protection of the citizens." *Gardner v. Jenkins*, 541 A.2d 406, 409 (Pa. Commw. Ct. 1988) (citing *Minich v. Cty. of Jefferson*, 919 A.2d 356, 361 (Pa. Commw. Ct. 2007)). The Pennsylvania Uniform Firearms Act of 1995 (the Act) is an exercise of such power and is the primary body of legislation that governs the use, sale, and possession of firearms in the Commonwealth. 18 PA. STAT. AND CONS. STAT. ANN. §6101-6128 (West 2020). The Act is designed to "provide support to law enforcement in the area of crime prevention and control," but it does not inhibit law-abiding citizens from possessing or using firearms for protection, recreation, or employment. 1995 Pa. Legis. Serv. Sp. Sess. No. 1 Act 1995-17 (West). The sections below discuss section 6105 of the Act and how the Commonwealth can make out a *prima facie* case of felony section 6105 charges with evidence that the defendant possessed the firearm and was ineligible to do so.

a. At a preliminary hearing for section 6105 charges, the Commonwealth must prove a *prima facie* case of possession, ineligibility, and felony grading.

Section 6105 of the Act prohibits people convicted of certain crimes from using firearms. The prohibition is either permanent or for a period of years, depending on a person's prior conduct. tit. 18, § 6105. The rationale behind this prohibition is "to protect the public from convicted criminals who possess firearms." *Com. v. Gillespie*, 821 A.2d 1221, 1224 (Pa. 2003). Unlike sections of the Act that govern sales, permits, or concealed firearms, section 6105 violations are common cases for Philadelphia assistant district attorneys. These cases are

primarily charged as felonies and begin in the Philadelphia Municipal Court for preliminary hearing.[1]

The Pennsylvania Rules of Criminal Procedure that govern the Philadelphia Municipal Court provide for a preliminary hearing to be conducted in cases with felony charges to determine whether the Commonwealth has established a *prima facie* case. 204 PA. CODE § 1003(e) (2020). A *prima facie* case exists when the Commonwealth produces evidence, which must be read in a light most favorable to the Commonwealth, that "establishes sufficient probable cause to warrant the belief that the accused committed the offense." *Com. v. Huggins,* 836 A.2d 862, 866 (Pa. 2003). To establish a *prima facie* case for section 6105, the Commonwealth must prove that a person possessed a firearm and had a prior conviction that disqualifies him or her from possession of a firearm. *Com. v. Williams*, 911 A.2d 548, 550–51 (Pa. Super. Ct. 2006).

b. A *prima facie* case of "possessing" a firearm is made out by circumstantial evidence that shows an individual's intent and power to control a firearm.

A person "possesses" a firearm if he or she intends to control, and has the power to control, the firearm. PA-JICRIM No. 15-6105 (2019). Possession of a firearm can be actual, constructive, or jointly constructive. *Com. v. Gutierrez,* 969 A.2d 584, 590 (Pa. Super. Ct. 2009) (citing *Com. v. Heidler*, 741 A.2d 213, 215 (Pa. Super. Ct. 1999)). Constructive possession can be established when the weapon was not located on the accused's person but he or she had "the ability to consciously exercise control over it" and " the intent to exercise such control." *Com. v. Micking*, 17 A.3d 924, 926 (Pa. Super. Ct. 2011) (citing *Com. v.*

[1] This unit is staffed by new assistant district attorneys, often in their first position out of law school. This unit conducts preliminary hearings for felony cases and prosecutes all misdemeanor trials.

Sanes, 955 A.2d 369 (Pa. Super. Ct. 2008)). Possession can be established though circumstantial evidence or inference based on the totality of the circumstances. *See Micking*, 17 A.3d at 926 (citing *Com. v. Valette*, 613 A.2d 548, 550 (Pa. 1992)).

c. To determine if someone is ineligible to possess a firearm, assistant district attorneys should consult the subsections of 6105 that list disqualifying offenses.

Section 6105 describes the types of convictions that permanently disqualify an individual from possession, use, or control of a firearm. Subsection (b) lists thirty-eight disqualifying offenses, primarily violent crimes.[2] Subsection (c) also expands disqualification to those who have been convicted of certain offenses under The Controlled Substance, Drug, Device and Cosmetic Act. 35 PA. STAT. AND CONS. STAT. ANN. § 780-1—780-144 (West 2020). Also ineligible to possess firearms are individuals who are fugitives from justice; convicted of driving under the influence on three or more occasions in a five-year period; adjudicated incompetent or involuntarily committed; illegally in the United States; subject to an active final protection from abuse order or an active order that requires relinquishment of firearms; or prohibited of shipping or transporting firearms under 18 U.S.C. § 922(g)(9). § 6105(c).

[2] These include convictions for the following offense in the Commonwealth or equivalent in other states – prohibited offensive weapons; corrupt organizations; possession of a weapon on school property; murder; voluntary manslaughter; involuntary manslaughter (reckless use of a firearm); aggravated assault; assault by prisoner; assault by life prisoner; stalking; weapons of mass destruction; kidnapping; unlawful restraint; luring a child into a motor vehicle or structure; rape; involuntary deviant sexual intercourse; aggravated indecent assault; arson and related offenses; causing or risking catastrophe; burglary; criminal trespass graded as a felony of the second degree or higher; robbery; robbery of a motor vehicle; theft by unlawful taking (conviction of second felony offense); extortion accompanied by threats of violence; receiving stolen property (conviction of second felony offense); false reports to law enforcement (involving theft of a firearm); impersonating a public servant (law enforcement officer); witness or victim intimidation; retaliation against witness, victim, or party; escape; weapons or implements for escape; riot; prohibited paramilitary training; facsimile weapons of mass destruction; possession of a firearm by a minor; corruption of minors; sale or lease of weapons and explosives.

For individuals with prior juvenile adjudications, ineligibility to possess a firearm depends on the offense underlying the adjudication, the current age of the individual, and the amount of time that has passed since the offense. The thirty-eight disqualifying offenses in subsection (b) concern adult convictions, not juvenile adjudications. However, an individual is permanently prohibited from possessing a firearm if he or she has a juvenile adjudication for a specific subset of subsection (b) offenses that would disqualify an adult.[3] § 6105(c)(7). But, if an individual is adjudicated delinquent of any subsection (b) offense not specified for permanent prohibition, he or she is prohibited only until age 30 or until 15 years have passed since the last applicable juvenile adjudication. § 6105(c)(8).

At trial for section 6105 charges, the Commonwealth can introduce the defendant's disqualifying criminal conviction. The Commonwealth is not required to accept a stipulation that recognizes, but does not specifically identify or name, the offense that disqualifies the defendant from firearms possession. *Com. v. Jemison*, 98 A.3d 1254, 1261 (Pa. 2014). However, at a preliminary hearing for section 6105 charges the Commonwealth need only make a *prima facie* showing of the defendant's ineligibility to possess a firearm. This is easily accomplished stipulation or simply entering into evidence the defendant's secure court summary or criminal extract which shows a conviction for a disqualifying offense.[4]

d. 6105 offenses are graded as misdemeanors by default but are usually elevated to felonies because of the defendant's prior record and circumstances of firearm possession.

[3] These offenses are murder, voluntary manslaughter, aggravated assault, assault by prisoner, assault by a life prisoner, kidnapping, rape, involuntary deviate sexual intercourse, arson and related offenses, burglary, robbery, and theft by extortion with threat of violence.

[4] While opposing counsel could ask for the court clerk to be called to the witness stand to testify to the authenticity of the secure court summary, this is rarely requested for reasons of expediency.

The default grading of a section 6105 offense is a misdemeanor in the first degree, yet various factors can elevate the offense to a felony. § 6119. If the individual 1) has a prior conviction listed in section 6105(b), or 2) has a prior conviction for certain provisions of The Controlled Substance, Drug, Device and Cosmetic Act, the offense can be elevated to a second-degree felony. § 6105(a.1)(1). Section 6105 can also be a second-degree felony when the individual has a prior conviction for theft by extortion with threats of violence or two or more convictions of theft by unlawful taking or receiving stolen property graded as second- or third-degree felonies. *Id.* The offense is further elevated to a felony of the first-degree if the individual has any of the prior convictions that merit second-degree felony gradation and has either 1) a prior conviction for section 6105, or 2) was in physical possession or control of the firearm. Physical possession or control is met when the firearm was visible or concealed on his or her person, or was within his or her reach. § 6105(a.1)(1.1)(i). The language about physical possession or control is similar to the requirements for the Deadly Weapon Enhancement under the Pennsylvania Criminal Sentencing Guidelines, which permits the enhancement if the firearm is "on the offender's person or within his immediate physical control." 204 PA. CODE § 303.10 (2020). At a preliminary hearing, a *prima facie* case of physical possession is easily made out with testimonial evidence.

When someone is prohibited from possessing a firearm due to a juvenile adjudication alone, the section 6105 offense should be graded as a misdemeanor in the first degree. *Com. v. Hale*, 128 A.3d 781 (Pa. 2015). In *Hale* the Pennsylvania Supreme Court addressed whether juvenile adjudications are "convictions" under section 6105(b) that would elevate the firearms possession to a felony under section 6105(a)(1). *Id.* at 783. The court found the term

"conviction" does not usually include juvenile adjudications and referenced the specific distinction within section 6105 between "convictions" and "juvenile adjudications." [5] *Id.* (citing § 6105(c)(7)). The *Hale* court did not hold that juvenile adjudications do not disqualify an individual from possessing a firearm. *See Com. v. Walker*, 2017 WL 2992978, at *32 (Pa. Super. Ct. July 14, 2017). The decision just means that for an individual prohibited from possessing a firearm due only to a juvenile adjudication, the offense cannot be a felony. § 6105(c)(7) and (8); § 6119.

III. CONCLUSION

Although section 6105 is dense and complex, preliminary hearings for this offense can be simple and formulaic. In preparation for the hearing, assistant district attorneys should first identify the evidence that supports the individual possessed a firearm. Then, identify the prior offense, or combination of offenses, that disqualify the individual from firearms possession. If those disqualifying offenses are juvenile adjudications, the offense is properly graded as a misdemeanor in the first degree. If the disqualifying priors are adult convictions, assistant district attorneys should analyze whether the felony enhancement applies, and to what degree, based on the circumstances of the offense. Command of section 6105 and its subsections will allow assistant district attorneys to efficiently and successfully conduct preliminary hearings for these important cases.

[5] The court also cited discussions by the United States Supreme Court in *Miller vs. Alabama* stating "children are constitutionally different from adults for the purpose of sentencing." 567 U.S. 460, 471 (2012).

Applicant Details

First Name	**Reed**
Middle Initial	**G**
Last Name	**Shaw**
Citizenship Status	**U. S. Citizen**
Email Address	**reedgshaw@berkeley.edu**
Address	**Address** Street **1503 Vermont Avenue NW #C** City **Washington** State/Territory **District of Columbia** Zip **20005** Country **United States**
Contact Phone Number	**4349069669**

Applicant Education

BA/BS From	**Harvard University**
Date of BA/BS	**May 2017**
JD/LLB From	**University of California, Berkeley School of Law** **https://www.law.berkeley.edu/careers/**
Date of JD/LLB	**May 15, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Berkeley Journal of Employment and Labor Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Oppenheimer, David
doppenheimer@law.berkeley.edu
Klarman, Rachael
rklarman@governingforimpact.org
Ross, Bertrall
bertrallr@berkeley.edu

References

I am attaching recommendation letters from Professor Bertrall Ross (bross@law.berkeley.edu, 510-643-5788), Professor David Oppenheimer (doppenheimer@law.berkeley.edu, 510-643-3225) and my supervisor at Governing for Impact Rachael Klarman (rklarman@governingforimpact.org, 434-466-6241). For further references, you can reach Rachael Klarman, Professor Jonathan Gould (gould@berkeley.edu, 857-498-1438) from my Administrative Law class, Erin Bernstein and Jill Habig (jill@publicrightsproject.org and ebernstein@bradleybernsteinllp.com) from my State and Local Impact Litigation Practicum, Rachel Kafele (rachel.kafele@oasislegalservices.org, 415-347-6503) at Oasis Legal Services.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 13, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a second-year law student at the University of California, Berkeley, School of Law, and I am writing to apply for a clerkship in your chambers beginning in Fall 2022 or later. As a queer man, I have learned how and who the law does and does not serve, and I hope to spend my career making the law work for those who need it most.

My demonstrated ability to shoulder significant responsibility, advocacy work on behalf of consumers and immigrants, and research and writing experience would make me a strong addition to your chambers. I am one of the two co-chairs of the Consumer Advocacy and Protection Society and have political, litigation, and advocacy experience that will make me an effective judicial clerk.

I am enclosing a resume, law school transcript, undergraduate transcript, and writing sample. Additionally, I am attaching recommendation letters from Professor Bertrall Ross (bross@law.berkeley.edu, 510-643-5788), Professor David Oppenheimer (doppenheimer@law.berkeley.edu, 510-643-3225) and my supervisor at Governing for Impact Rachael Klarman (rklarman@governingforimpact.org, 434-466-6241). For further references, you can reach Rachael Klarman, Professor Jonathan Gould (gould@berkeley.edu, 857-498-1438) from my Administrative Law class, Erin Bernstein and Jill Habig (jill@publicrightsproject.org and ebernstein@bradleybernsteinllp.com) from my State and Local Impact Litigation Practicum, Rachel Kafele (rachel.kafele@oasislegalservices.org, 415-347-6503) at Oasis Legal Services.

I look forward to hearing from you and thank you in advance for your consideration of my application.

Sincerely,

Reed Shaw
1503 Vermont Avenue NW #C
Washington, DC 20005

REED G. SHAW

(434) 906 9669 | reedgshaw@berkeley.edu | 1503 Vermont Avenue NW #C, Washington, DC 20005

EDUCATION

University of California, Berkeley, School of Law, Berkeley, CA
J.D. Candidate, May 2022
Honors: Dean's Fellowship (merit-based tuition award)
Activities: Professor David Oppenheimer, Research Assistant; Consumer Advocacy and Protection Society (CAPS), Co-Chair; *Berkeley Journal of Employment and Labor Law*, Associate Editor; Queer Caucus; American Constitution Society; Berkeley Pro Bono Service Trip (Tijuana); Election Law @ Berkeley

Harvard University, Cambridge, MA
B.A., High Honors, Social Studies (Latin American Politics), Minor in Economics, May 2017
Activities: Harvard Club Swimming, Captain; Institute of Politics; HUBBS (LGBTQ business society); After-School Counseling Group (Mission Hill After School Program)
Study Abroad: Universidad de La Habana, Havana, Cuba (Fall 2015)

EXPERIENCE

U.S. Dept. of Justice, Civil Rights Division, Washington, DC
Incoming Fall Legal Intern Sept. 2021 – Dec. 2021

Cohen Milstein Sellers & Toll PLLC, Washington, DC
Summer Associate May 2021 – Present

Governing for Impact, Washington, DC (remote)
Legal Intern (Summer FT, academic year PT) May 2020 – May 2021
Conduct legal research and writing for an organization compiling a legal analysis of how the new administration can most effectively implement progressive priorities through administrative agencies.

Biden for President, Wilmington, DE (remote); Tampa, FL
Volunteer Voter Protection Fellow (PT), W. Cent. Fl. Ballot Cure Coordinator (FT) May 2020 – Nov. 2020
Prepared contingency-planning materials for campaign leadership. Recruited, trained, and managed volunteers across eight counties who completed 1200 volunteer hours to help 1100 voters cure their mail ballot signatures.

Oasis Legal Services, Berkeley, CA
Intern (PT) Sept. 2019 – May 2020
Drafted and submitted affirmative asylum applications with LGBTQ+ clients. Advocated at asylum interviews.

Delivery Associates, Castries, Saint Lucia
Delivery Leader Jan. 2019 – Jun. 2019
Directed projects, managed relationships, and advised principals within and across multiple government ministries to enhance citizen impact in the areas of health care, judicial efficiency, rehabilitation, and road/air infrastructure.

Future Forward USA, Washington, DC; San Francisco, CA
Co-Founder, Director of Operations and Partnerships Aug. 2017 – Dec. 2018
Designed and executed the largest advertising experiments ever conducted in politics. Oversaw budget, operations, and legal compliance for a 501(c)(4) and hybrid SuperPAC that supported progressives with rigorously tested ads.

Previous: The White House (Internship)**,** Enroll America (Internship), Obama for America (Deputy Data Director)

PUBLICATIONS

Reed Shaw, *Promoting Accountability Under Presidential Administration: Learning from the Trump Years*, Submitted (2021).

Reed Shaw, *"Good Cause" for a Good Cause: Using an APA Exception to Confront the COVID-19 Crisis*, 21 J.L. SOC'Y 116 (2021).

Reed Shaw, *Neoliberalism or Nah? Right-Wing Party Success In Contemporary Latin America*, 28 No. 2 COL. J. OF POL. & SOC'Y 7-37 (2018).

ADDITIONAL INFORMATION

Language/technical: Spanish (advanced), R, SQL, Python, NGPVAN
Interests: Ocean swimming, bagels, distance running, politics, bar trivia, cat parenthood

Official Academic Transcript from:
UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW
OFFICE OF THE REGISTRAR
270 SIMON HALL
BERKELEY, CA 94720-7200

TELEPHONE: 510-643-2278

Document Type: THIRD-PARTY SECURE PDF

Official Academic Transcript of:
REED SHAW
Transcript Created: 11-Jun-2021

Intended Recipient:
REED SHAW
2128 MCKINLEY AVE
BERKELEY, CA 94703-1520

E-Mail: reedgshaw@berkeley.edu

Requested by:
REED SHAW
2128 MCKINLEY AVE
BERKELEY, CA 94703-1520

E-Mail: reedgshaw@berkeley.edu

Delivered by:
Parchment, LLC
Under Contract To:
UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW
Order Number: 1FL761957- 1
Telephone: (847) 716-3005

Statement of Authenticity

This Official Academic Transcript in Portable Document Format (PDF) was requested by the individual identified above in compliance with the provisions of the Family Educational Rights and Privacy Act of 1974 as Amended and in conformance with the prescribed ordering procedures of University of California, Berkeley, School of Law who has contracted with Parchment, LLC of Scottsdale, AZ for electronic delivery of Official Academic Transcripts in PDF form. You may verify the authenticity of our relationship with University of California, Berkeley, School of Law by visiting their website at https://www.law.berkeley.edu/academics/registrar/transcripts/.

Colleges and Universities

If you are an accredited post-secondary academic institution, please be advised that you are receiving this transcript as a "Third-Party" receiver. Since you are not registered to our Parchment Receive service, additional security provisions have been added to this document to prevent content copying or alteration. You also are not permitted to print the document without watermark protections or add notations to the document when saving to your student information system. Should you wish to receive future documents through our electronic networks without these additional security features, please register your institution at https://info.parchment.com/compare_receive.html.

Privacy and Other Information

This Official Academic Transcript is for delivery to the above-named "Intended Recipient". If you are not the "Intended Recipient", please notify the Office of the Registrar at University of California, Berkeley, School of Law. You are not permitted to copy or alter this document. You may not forward this document or disclose its contents to any person or organization other than the "Intended Recipient" without the express written permission of the student. If this document is copied or printed, the words "PRINTED COPY" will appear in the replicated transcript image.

In the interest of security and privacy, we delete this Official Academic Transcript from our server 48 hours after it is initially downloaded excluding weekends and holidays. If a replacement is subsequently needed, the requesting party must order another transcript from University of California, Berkeley, School of Law. If you have any questions about this document please contact Parchment Customer Service at (847) 716-3005. Our operators are available from 7:00 am to 7:00 pm Monday through Friday (Central Time).

Berkeley Law
University of California
Office of the Registrar

Reed Shaw
Student ID: 3034918108
Admit Term: 2019 Fall

Academic Program History
Major: Law (JD)

2019 Fall

Course		Description	Units	Law Units	Grade
LAW	200F	Civil Procedure David Oppenheimer	5.0	5.0	H
LAW	202.1A	Legal Research and Writing Kerry Kumabe	2.0	2.0	CR
LAW	202F	Contracts Abbye Atkinson	5.0	5.0	H
LAW	230	Criminal Law Avani Sood	4.0	4.0	P

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	16.0	16.0

2020 Spring

Course		Description	Units	Law Units	Grade
LAW	201	Torts Talha Syed	5.0	5.0	CR
LAW	202.1B	Written and Oral Advocacy **Units Count Toward Experiential Requirement** Kerry Kumabe	2.0	2.0	CR
LAW	203	Property Molly Van Houweling	4.0	4.0	CR
LAW	220.6	Constitutional Law **Fulfills Constitutional Law Requirement** Bertrall Ross	4.0	4.0	CR
LAW	221.8	Stat Implem: Agcy Pol thru Reg **Units Count Toward Experiential Requirement** Jolina Cuaresma	1.0	1.0	CR

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	32.0	32.0

* **Due to COVID-19, law school classes were graded credit/no pass in spring 2020.**

2020 Fall

Course		Description	Units	Law Units	Grade
LAW	226.9	State&Local Impct Lit Prac Sem **Units Count Toward Experiential Requirement** Erin Bernstein Jill Habig	2.0	2.0	P
LAW	226.9A	State&Local Impact Lit Pract **Units Count Toward Experiential Requirement** Erin Bernstein Jill Habig	2.0	2.0	H
LAW	241	Evidence Andrea Roth	4.0	4.0	H
LAW	249.41	Tax Exempt Org&Hybrid Struct Tomer Inbar	1.0	1.0	CR
LAW	295	Civ Field Placement Ethics Sem **Fulfills Either Prof. Resp. or Experiential** Brendan Darrow Susan Schechter Sharon Hing	2.0	2.0	P
LAW	295.6A	Civil Field Placement **Units Count Toward Experiential Requirement** Susan Schechter	3.0	3.0	CR
LAW	299	Indiv Res Project **Fulfills Writing Requirement** Bertrall Ross	2.0	2.0	HH

	Units	Law Units
Term Totals	16.0	16.0
Cumulative Totals	48.0	48.0

2021 Spring

Course		Description	Units	Law Units	Grade
LAW	223	Administrative Law Jonathan Gould	4.0	4.0	HH
LAW	252.2	Antitrust Law Talha Syed	4.0	4.0	P
LAW	272.31	Supreme Crt Confronts Clim Chg Daniel Farber	1.0	1.0	CR
LAW	297	Self-Tutorial Sem David Oppenheimer	1.0	1.0	CR

Carol Rachwald, Registrar

Berkeley Law
University of California
Office of the Registrar

Reed Shaw
Student ID: 3034918108
Admit Term: 2019 Fall

	Units	Law Units
Term Totals	10.0	10.0
Cumulative Totals	58.0	58.0

2021 Fall

Course		Description	Units	Law Units	Grade
LAW	295.9A	UCDC: Law Field Placement	11.0	11.0	
		Units Count Toward Experiential Requirement			
		Susan Schechter			
		Nicole Lehtman			
LAW	295D	UCDC: Law in the Capital	3.0	3.0	
		Units Count Toward Experiential Requirement			
		Susan Schechter			
		Nicole Lehtman			

	Units	Law Units
Term Totals	0.0	0.0
Cumulative Totals	58.0	58.0

Carol Rachwald, Registrar

University of California
Berkeley Law
270 Simon Hall
Berkeley, CA 94720-7220
510-642-2278

KEY TO GRADES

1. Grades for Academic Years 1970 to present:

HH	–	High Honors	CR	–	Credit
H	–	Honors	NP	–	Not Pass
P	–	Pass	I	–	Incomplete
PC	–	Pass Conditional or Substandard Pass (1997-98 to present)	IP	–	In Progress
NC	–	No Credit	NR	–	No Record

2. Grading Curves for J.D. and Jurisprudence and Social Policy PH.D. students:

In each first-year section, the top 40% of students are awarded honors grades as follows: 10% of the class members are awarded High Honors (HH) grades and 30% are awarded Honors (H) grades. The remaining class members are given the grades Pass (P), Pass Conditional or Substandard Pass (PC) or No Credit (NC) in any proportion. In first-year small sections, grades are given on the same basis with the exception that one more or one less honors grade may be given.

In each second- and third-year course, either (1) the top 40% to 45% of the students are awarded Honors (H) grades, of which a number equal to 10% to 15% of the class are awarded High Honors (HH) grades or (2) the top 40% of the class members, plus or minus two students, are awarded Honors (H) grades, of which a number equal to 10% of the class, plus or minus two students, are awarded High Honors (HH) grades. The remaining class members are given the grades of P, PC or NC, in any proportion. In seminars of 24 or fewer students where there is one 30 page (or more) required paper, an instructor may, if student performance warrants, award 4-7 more HH or H grades, depending on the size of the seminar, than would be permitted under the above rules.

3. Grading Curves for LL.M. and J.S.D. students for 2011-12 to present:

For classes and seminars with 11 or more LL.M. and J.S.D. students, a mandatory curve applies to the LL.M. and J.S.D. students, where the grades awarded are 20% HH and 30% H with the remaining students receiving P, PC, or NC grades. In classes and seminars with 10 or fewer LL.M. and J.S.D. students, the above curve is recommended.

Berkeley Law does not compute grade point averages (GPAs) for our transcripts.

For employers, more information on our grading system is provided at: https://www.law.berkeley.edu/careers/for-employers/grading-policy/

Transcript questions should be referred to the Registrar.

This Academic Transcript from The University of California Berkeley Law located in Berkeley, CA is being provided to you by Credentials Inc. Under provisions of, and subject to, the Family Educational Rights and Privacy Act of 1974, Credentials Inc. of Northfield, IL is acting on behalf of University of California Berkeley Law in facilitating the delivery of academic transcripts from The University of California Berkeley Law to other colleges, universities and third parties using the Credentials' TranscriptsNetwork™.

This secure transcript has been delivered electronically by Credentials Inc. in a Portable Document Format (PDF) file. Please be aware that this layout may be slightly different in look than The University of California Berkeley Law's printed/mailed copy, however it will contain the identical academic information. Depending on the school and your capabilities, we also can deliver this file as an XML document or an EDI document. Any questions regarding the validity of the information you are receiving should be directed to: Office of the Registrar, University of California Berkeley Law, 270 Simon Hall, Berkeley, CA 94720-7200, Tel: (510) 642-2278.

Harvard University

Cambridge, Massachusetts 02138

Harvard College

Shaw, Reed Gregory
Admitted in 2013
Good Academic Standing

Eliot House
HUID: **50871576**

Degrees Awarded

Degree: Bachelor of Arts
Date Conferred: 05/25/2017
Degree Honors: Cum Laude in Field
Degree Honors: Recommended for High Honors

Academic Program

Concentration: Social Studies
Language Citation: Spanish
Secondary Field: Economics

Beginning of Harvard College Record

2013 Fall

Course	Description	Earned	Grade
COMPSCI 50	Introduction to Computer Science I	4.000	A
EXPOS 20.217	Expository Writing 20	4.000	B+
FRSEMR 24N	Child Health in America	4.000	SAT
SPANSH C	Intermediate Spanish	4.000	A

2014 Spring

Course	Description	Earned	Grade
ECON 10B	Principles of Economics	4.000	A-
GOV 1295	Comparative Politics in Latin America	4.000	B+
MATH 21A	Multivariable Calculus	4.000	B+
SPANSH 40	Advanced Spanish Language II: Viewing the Hispanic World	4.000	A-

2014 Fall

Course	Description	Earned	Grade
ECON 1011A	Microeconomic Theory	4.000	B+
HISTSCI 108	Bodies, Sexualities, and Medicine in the Medieval Middle East	4.000	A
SOC-STD 10A	Introduction to Social Studies	4.000	B
STAT 104	Introduction to Quantitative Methods for Economics	4.000	B+

2015 Spring

Course	Description	Earned	Grade
AFRAMER 109	Using Film for Social Change	0.000	WD
ECON 1010B	Macroeconomic Theory	4.000	B
GOV 94HG	The Politics and Political Economy of Inequality in Latin America	4.000	A-
HEB 1310	Hormones and Behavior	4.000	B
SOC-STD 10B	Introduction to Social Studies	4.000	B+

2015 Fall

Granted 16.000 credits for work done at DRCLAS Study Abroad Cuba

2016 Spring

Course	Description	Earned	Grade
ECON 1420	American Economic Policy	4.000	A-
GOV 62	Research Practice in Qualitative Methods	4.000	A-
GOV 1092	Progressive Alternatives: Institutional Reconstruction Today	4.000	A-
SOC-STD 98PC	Comparing India and China	4.000	A
US-WORLD 35	Dilemmas of Equity and Excellence in American K-12 Education	4.000	A-

2016 Fall

Course	Description	Earned	Grade
DPI 460	Latin American Politics and Policymaking	4.000	A-
DPI 662	Digital Government: Technology, Policy, and Public Service Innovation	4.000	B+
EXPOS 40	Public Speaking Practicum	4.000	A
SOC-STD 99A	Tutorial - Senior Year	4.000	SAT

2017 Spring

Course	Description	Earned	Grade
ECON 980O	Measuring and Modeling Social Networks	4.000	A
SCILIVSY 17	Human Physiology: From Personal To Public Health	4.000	A
SOC-STD 99B	Tutorial - Senior Year	4.000	SAT

Harvard College Career Totals

Cum GPA: 3.587 **Cum Totals** **128.000** **100.000**

End of Harvard College Record

Date Issued: Oct 11, 2017
Page 1 of 1

Michael P. Burke, Registrar
Not official unless signed and sealed

March 21, 2021

Re: Reed Shaw

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am happy to recommend my student and research assistant Reed Shaw for a judicial clerkship. He is a good student, a successful and energetic leader and participant in a number of law school and community service groups, and a very promising lawyer. And, he is a deeply thoughtful person, with a strong commitment to participation in politics and policy, whom I have been very glad to get to know.

In my fall 2019 Civil Procedure class Reed wrote a very good exam answer, earning an Honors grade for the course. He was well prepared in class, and a frequent visitor to office hours. He was hungry to talk about how litigation can be a tool for social justice.

This year Reed is working with me on a paper on the origins of the diversity justification for affirmative action. He is doing research on the social history of the early twentieth century that led to Justice Holmes and Justice Frankfurter to form their views on academic freedom. His work has been very good, with a keen sense of how several leading thinkers influenced each other.

Given the academic demands of law school and the challenge of being a student during the pandemic, it would be reasonable to expect our students to be buried in their books. Reed has been an active writer, submitting two articles for publication and helping to edit our *Berkeley Journal of Labor and Employment Law*. But in addition, outside of (virtual) class Reed is an activist leader in two of our pro bono projects, the Consumer Advocacy and Protection Society and an asylum project, and did an internship with a legal services office doing affirmative asylum work for LGBTQ+ refugees.

From our office hours discussions and his work as my research assistant, I feel I've gotten to know Reed well. He feels deeply about equality rights and politics/policy, and is enthusiastic about seeking a career with the Department of Justice.

In sum, Reed Shaw is making his mark at Berkeley Law as a good student, an activist leader, and a participant in important scholarly, community and service learning activities. I have every confidence that he will be an excellent public service lawyer, and (more to the point) an excellent law clerk. He has my highest recommendation.

Please feel free to contact me regarding this recommendation. I can be reached by email at doppenheimer@law.berkeley.edu or by phone (cell) at 510/326-3865.

Sincerely,

David B. Oppenheimer
Clinical Professor of Law

May 10, 2021

Dear Judge:

I write enthusiastically in support of the clerkship application of Reed Shaw, who is scheduled to graduate from Berkeley Law in May of 2022. I have known Reed for more than a decade and have had the pleasure of working with him in multiple capacities. Most recently, he served as my legal intern at Governing for Impact – the nonprofit organization of which I am the Executive Director – where he has been an invaluable member of our team since the summer of 2020. Reed is hard working, dependable, brilliant, and, perhaps most importantly, extraordinarily kind. I am certain that he will be an exemplary judicial law clerk and I recommend him without reservation and with the utmost enthusiasm.

I first met Reed when he volunteered for a congressional campaign in 2010, on which I was the deputy field director. Though merely a fifteen-year old volunteer, he operated with the maturity, social intelligence, and creativity of our most valuable staff. Within weeks, he went from making phone calls to managing phone banks and from knocking doors to training an extensive network of field organizers and volunteers. I quickly sensed his determination to use his talents to make the world a more just place and help those less fortunate. During that first campaign, Reed quietly ended each day offering to review any data that we had received. He began asking questions we had not thought to ask and seeing patterns and opportunities we had missed. By the end of the campaign, he effectively served as our data director despite being a fulltime high school student, and made a serious contribution to our over-performance in an anti-incumbent wave election.

I next worked with Reed in 2012, when at the age of nineteen, he served as the deputy data director for the Obama campaign in Virginia. In that capacity, he was responsible for training and providing support to more than 150 field staffers, most of who were significantly older and more experienced. While some on the campaign initially worried about having someone so young in this role, Reed was incredibly successful, both because of his prodigious talent and because, even then, he was mature beyond his years, and processed a tremendous level of compassion and innate leadership qualities that made everyone want to work with him or for him.

While Reed and I have kept in close touch since the 2012 campaign, I did not have the chance to work with him again until this past year, when he agreed to spend the summer after his first year of law school working as my legal intern. As I mentioned, I am the Executive Director of Governing for Impact, a nonprofit organization founded in 2019 with a goal of preparing a then-potential new presidential administration to make real progressive change. One of the major projects that we worked on in 2020 was drafting a series of legal memoranda analyzing how a new administration could efficiently roll back the prior administration's regulatory agenda and effectively implement progressive priorities through executive and regulatory action.

I had been eager to hire Reed because of the qualities I have mentioned – his work ethic, natural intelligence, and pleasant demeanor – but I will admit that before he came to work for me in this capacity, I had no idea that he is also a truly excellent writer and possesses a keen legal mind. As our intern, Reed regularly produced written work products that were at least on par with (and often, frankly, were superior to) the work we received from others working on the project, including partners and associates at major law firms and former government lawyers with years of experience.

Three instances in particular stand out to me as illustrative of Reed's work over the last year. First, Reed wrote a legal memorandum analyzing whether the Occupational Health and Safety Administration could revise its regulations to include domestic workers. Reed wrote this memo almost entirely by himself, with only minimal feedback from me. When we shared the memo with some of the experts we were working with, including lawyers who had served in high-ranking jobs at the Department of Labor, they all commented on how well done the memo was. In addition, we asked a noted constitutional law scholar to review Reed's analysis of the commerce clause issues implicated by the proposed action, and he went out of his way to compliment us on the thoroughness of the analysis.

Another time, I asked Reed to write a memo describing how an agency can use and justify the Administrative Procedure Act's "good cause" exception to notice-and-comment rulemaking. While reviewing the memo, I told him that I thought he could expand on it and submit it as a law review article because it was so well researched and persuasive. He did so, and the article was recently published in the Journal of Law and Society.

Finally, over the summer, I asked Reed to try and figure out if there was a way we could argue that a new administration could accomplish a specific policy goal of ours through regulation. This was something that a number of lawyers and advocates were thinking through at the time, and no one had been able to come up with a plausible argument. While I cannot go into details, Reed conducted extensive legal research and came up with an idea. We wrote it up and ran it by other advocates who were all impressed and excited by the theory. It now seems likely that the Biden Administration will take this action using the theory that Reed came up. It would not have happened without his work.

I will end by noting again that in addition to being brilliant, Reed is also a joy to work with. He somehow lacks the arrogance someone with his many talents could easily have adopted, and is willing to tackle any problem for the cause at hand. I have worked with him in a range of different environments, including political campaigns where tensions often run high, and I have never known him to lose his temper or even say an unkind word to anyone.

In my opinion, Reed possesses all of the qualities one would want in a judicial law clerk. He is hard working, dependable, brilliant, and kind. He also writes extremely well and has a keen legal mind. I recommend him enthusiastically and feel confident he will make an exceptional judicial law clerk.

Sincerely,
Rachael Klarman

May 27, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write with the greatest enthusiasm to recommend Reed Shaw for a clerkship in your chambers. Reed was a student in my Constitutional Law class and developed a paper under my supervision for independent studies credit. Due to the shift to a credit/no credit grading system as a result of the COVID-19 pandemic, I cannot provide a comparative evaluation of his performance in the Constitutional Law class. However, for the paper he wrote for independent studies credit, Reed received a grade of High Honors. The qualities of Reed that really stood out in Constitutional Law and his development of the writing project are his intellectual dexterity, strength as a writer, discipline and hard work, and demonstrated commitment to serving marginalized communities. I am confident that Reed would be an outstanding clerk.

In the Constitutional Law course, we examined the legal doctrines of judicial review, methods that the Supreme Court uses to interpret the Constitution, the critical structural components of the Constitutions—Separation of Powers and Federalism—and two important sources of rights in the Constitution—the Fourteenth Amendment Equal Protection and Due Process Clauses. This is ordinarily one of the more challenging classes for first year law students as the Constitution itself and the doctrine that the Court has constructed around it are quite ambiguous and vague and requires students to employ the skill of analogy and distinction as the primary means for advancing particular legal claims. On the final exam, I asked the students to shift from the role of judge or clerk that they play in most of their first-year classes to the role of advocate required to advance the best legal argument for both sides of a hypothetical constitutional controversy.

Throughout the course, Reed was very engaged. We met regularly during office hours to discuss constitutional law doctrine and its development with many of our conversations leading to discussion of how the different standards and rules might apply to present controversies. In these conversations, Reed demonstrated an impressive capacity to distill doctrine and reason through analogy and distinction. I also appreciated Reed's curiosity and innovative thinking about how law might be used as a tool to advance the interests of the community of asylum seekers that he represented in his internship with Oasis Legal Service. On the exam, he exceeded the standard I set for the learning outcomes that I wanted all of the students to attain. He properly identified relevant rules and effectively applied them using reasoning by analogy and distinction.

I had the opportunity to learn more about Reed as a student and person during his development of the independent study project under my supervision. He was very professional in his approach to the project presenting to me at the outset a menu of ideas he wanted to pursue. Each of them was interesting, original, and ambitious and they demonstrated the tremendous level of thought he put into preparing for our meeting to discuss the projects. We settled on a project focused on promoting accountability under presidential administrations. The project was rather sprawling at the beginning as Reed wanted to focus on five different areas of administrative law and agency processes in which hypothesized that politics interfered with expert-driven agency decision-making during the Trump administration. Reed ultimately narrowed the focus of the paper to the agency grant making process and expert-driven policy areas. The project was challenging because the relevant administrative law doctrines, scholarships, regulations, and processes is wide-ranging copious. His task was to read as much of the relevant material as possible and synthesize them as part of the development of his claims and arguments. Each meeting, I identified a set of readings for Reed and by the next meeting he had not only read the articles that I suggested, but also several other related articles and relevant regulations and procedural rules of which I lacked awareness. When we met, Reed was able to distill this complex array of materials and explain how they might fit into the arguments and claims he was making. It was really impressive given that he was an early student of administrative law entering these legal and scholarly spaces for the first time.

Another thing to note is that he met every deadline we set for the development of the writing project. In my experience supervising independent studies projects, Reed was only one of a handful of students to have consistently met every one of the deadlines we set out for the project. With each version of the project that he submitted, I provided feedback and in every new iteration of the project Reed was very responsive to that feedback.

As to the project itself, Reed produced a very strong piece of scholarship. The paper builds from Elena Kagan' seminal work on presidential administration in which she identified guardrails that would constrain a president from interfering in agency processes. Those guardrails, Reed showed in this paper, had not effectively protected against recent political interventions into agency processes that should have been expert driven. Reed finds that recent presidential administrations exploited

Bertrall Ross - bertrallr@berkeley.edu

vulnerabilities in the structure of the administrative state to place unacceptable levels of political pressure on agencies. Reed argues in favor of a new set of guardrails to shore up these vulnerabilities and better protect against political intervention into expert-driven agency processes.

The paper is quite sophisticated in its account of the source and consequences of political pressure on expert-driven processes. Reed relies on an impressive array of primary and secondary sources to support the descriptive claims he makes in his paper. And his normative solutions that involve constructing additional guardrails for administrative processes are responsive to the problems that he identifies and have the further advantage of being tractable even in this polarized political context.

The final paper was not only substantively strong, but also very well written and organized. Despite the fact that administrative law lends itself to convoluted and overly technical writing, Reed's contribution is clear and very readable for experts and non-experts alike. I consider this quality to be important for clerks who need to clearly convey often technical subjects in their writing. Finally, the paper was very well researched, which demonstrates to me Reed's high level of diligence that should translate well into a clerkship.

As a person, Reed combines ambition with humility and kindness. He has a generosity of spirit and commitment to social justice that is evidenced in his advocacy and representation of marginalized and vulnerable communities. And at the same time, he is a law nerd who really enjoys learning and engaging in discussions about law. I think that Reed will be an excellent clerk that will add something very positive to any chamber in which he has an opportunity to work.

Sincerely,

Bertrall Ross

Bertrall Ross - bertrallr@berkeley.edu

I wrote a version of this paper for my 1L summer internship. The research, analysis, and writing are substantially my own, including revisions based on comments provided by my supervisor. I have included the full abstract and table of contents, but omitted most of the article for brevity's sake. The full article can be found at:
Reed Shaw, "Good Cause" for a Good Cause: Using an APA Exception to Confront the COVID-19 Crisis, 21 J.L. Soc'y 116 (2021).

"GOOD CAUSE" FOR A GOOD CAUSE: USING AN APA EXCEPTION TO CONFRONT THE COVID-19 CRISIS

REED SHAW†

† J.D. Candidate, 2022, University of California, Berkeley; B.A., 2017, Harvard University. Thank you to Rachael Klarman for her input, mentorship, and encouragement on this project and beyond, as well as to the Journal of Law in Society editorial staff. Thank you also to my family, friends, and partner for their support.

ABSTRACT

The Administrative Procedure Act (APA) includes narrow exceptions to its rulemaking procedures, including one for "good cause." In limited circumstances, including in the face of emergencies and public safety threats, the "good cause" exception allows agencies to issue legally binding rules without undergoing typical notice-and-comment. Since the APA's enactment, scholars have often chronicled with alarm increasingly frequent uses of the "good cause" exception by administrations of both parties.

Despite these concerns, this Article argues that the COVID-19 pandemic is exactly the type of emergency situation for which Congress created the "good cause" exception. The COVID-19 pandemic and associated recession are unprecedented economic and health emergencies. Administrative agencies under President Biden should use every tool at their disposal to bring relief quickly to Americans who have suffered at the hands of the virus and a failed federal government response to the same. Specifically, this Article implores the Department of Health and Human Services and the Department of Labor to use "good cause" to issue health and employment regulations that will aid Americans.

INTRODUCTION

The COVID-19 pandemic and associated recession are unprecedented economic and health emergencies. The Biden Administration should use every tool at its disposal to bring relief quickly to Americans who have suffered at the hands of the virus and the failed federal government response. While the new administration can and should address the crisis through legislation, it will likely need to do so via executive action as well. The fate of legislative proposals will depend on political bargaining and control of the House of Representatives and the Senate. Even with single-

hearing is required by statute, this subsection," which sets out the process for notice-and-comment rulemaking, "does not apply... when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[32] Second, 5 U.S.C. 553(d) states, in a provision applicable only to the "notice" part of "notice-and-comment": "The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except... (3) as otherwise provided by the agency for good cause found and published with the rule."[33]

II. USING "GOOD CAUSE"

A. Legal Standard

Agencies invoke the section 553 "good cause" exception to notice-and-comment rulemaking quite frequently. However, court decisions demonstrate that they ought to use it more sparingly and narrowly. Courts have held that whether a "good cause" invocation is proper "is determined on a case-by-case basis, based on the totality of the factors at play."[34] They weigh a number of factors, including:

> [w]hether the agency was acting pursuant to a statutory deadline; [t]he potential harm from providing advance notice of the rule; [t]he degree of economic harm created by delay to complete the notice-and-comment process; [t]he degree of harm to public safety created by delay to complete the notice-and-comment process; [w]hether the agency accepted and responded to post-promulgation public comment; [w]hether the agency issued the rule on a routine basis; [w]hether the rule was limited in scope; [w]hether the rule implicated significant reliance interests; [w]hether the agency issued the rule pursuant to an injunction; [w]hether the agency revised the rule in response to a court order;

CONG. RSCH. SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING: JUDICIAL REVIEW OF AGENCY ACTION 13-15 (2016) [hereinafter CRS REPORT].

32. 5 U.S.C. § 553(b)(3)(B) (2018).

33. 5 U.S.C. § 553(d) (2018).

34. California v. Azar, 911 F.3d 558, 575 (9th Cir. 2018) (internal citations and quotations omitted).

> [and] [w]hether the agency provided a contemporaneous justification for invoking good cause.[35]

While they all consider the totality of the factors, courts disagree about the applicable standard of judicial review for "good cause" determinations.[36] Some courts consider the decision to invoke "good cause" as a discretionary agency decision. The APA instructs courts reviewing discretionary agency decisions to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[37] Under this standard, courts will uphold agency decisions as long as the decision was not "a clear error of judgment" and the agency demonstrates that it considered all relevant factors and adequately explained its decision.[38] Other courts view the decision to invoke "good cause" as a legal conclusion and therefore afford agencies less deference. These courts consider *de novo* whether the agency complied with the APA.[39] Still other courts decline to apply either standard. These courts say only that they must "narrowly constru[e]" the "good cause provision."[40] Finally, a small number of courts combine the two standards. They consider *de novo* "whether the agency's asserted reason for waiver of notice and comment constitutes good cause, as well as whether the established facts reveal justifiable reliance on the reason," but apply arbitrary and capricious review to "any factual determinations made by the agency to support its proffered reason[.]"[41]

A recent circuit court split demonstrated the disagreement.[42] In 2008, the Attorney General used the "good cause" exception to issue an IFR, which retroactively applied the Sex Offender Registration and Notification Act's (SORNA) registration requirements to offenders who were convicted before SORNA's enactment.[43] In the IFR, the Attorney General justified his use of "good cause" by claiming a need to eliminate regulatory uncertainty and prevent "the commission of additional sexual assaults"

35. Yates, *supra* note 8, at 1444.
36. *See* CRS REPORT, *supra* note 31, at 3, 13.
37. 5 U.S.C. § 706(2)(A) (2018).
38. Motor Vehicle Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 30-31 (1983).
39. CRS REPORT, *supra* note 31, at 13.
40. *Id.* at 14.
41. *Id.* quoting United States v. Reynolds, 710 F.3d 498, 508 (3d Cir. 2013).
42. This is a canonical example of a circuit split on "good cause." For more discussion, *see* CRS REPORT, *supra* note 31, at 13-15; *see also* Nathanael Paynter, *Flexibility and Public Participation: Refining the Administrative Procedure Act's Good Cause Exception*, 2011 U. Chi. Legal F. 397, 399 (2011).
43. 28 C.F.R. § 72.3 (2020).

that could occur during the notice-and-comment period.[44] Individuals convicted of failing to register with the sex offender registry challenged the Attorney General's invocation of the "good cause" exception to issue this IFR. "[T]he Fifth and Eleventh Circuits applied the arbitrary and capricious standard[.]"[45] The Fourth and Sixth Circuits reviewed the determination *de novo*.[46] The Ninth, Third, and Eighth Circuits "declined to decide the appropriate standard of review," but also stated that the Attorney General's "good cause" invocation would have failed even if the deferential arbitrary and capricious review standard was applied.[47]

Ultimately, the circuits came to different conclusions. Interestingly, each court's choice of legal standard was not predicitive of the outcome.[48] For example, the Eleventh and Fifth Circuits came to opposite conclusions when they both applied the deferential 'arbitrary and capricious' standard to the Attorney General's action.[49] The Eleventh Circuit started its analysis by stating that "[a]gency actions under the [APA] are reviewed under the arbitrary and capricious standard, which provides the reviewing court with very limited discretion to reverse an agency decision."[50] It accepted the Attorney General's public safety argument to justify good cause, highlighting that the "[r]etroactive application of the rule allowed the federal government to immediately start prosecuting sex offenders who failed to register in state registries."[51]

The Fifth Circuit, on the other hand, struck down the Attorney General's use of "good cause;"[52] In its more lengthy description of the "arbitrary and capricious standard," the Court explained that it was "prohibited from substituting [its] judgment for that of the agency."[53] In contrast to the Eleventh Circuit however, the Attorney General's public

---

44. OFF. OF ATT'Y GEN., Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg 8894, 8896-97 (Feb. 28, 2007).

45. CRS REPORT, *supra* note 31, at 15; *see also* United States v. Garner, 767 F.2d 104, 115-16 (5th Cir. 1985).

46. *See* CRS REPORT, *supra* note 31, at 15.

47. *Id.*

48. *See id.*

49. *See* United States v. Brewer, 766 F.3d 884, 888 (8th Cir. 2014) ("This deferential standard appears similar to the
approach taken by the Fifth and Eleventh Circuits, which each used an arbitrary-and-capricious standard"); United States v. Dean, 604 F.3d 1275, 1282 (11th Cir. 2010) ("The Attorney General had good cause to bypass the Administrative Procedure Act's notice and comment requirement."); United States v. Johnson, 632 F.3d 912, 928 (5th Cir. 2011) ("Here, we do not find the Attorney General's reasons for bypassing the APA's notice-and-comment and thirty day provisions persuasive").

50. Dean, *supra* note 49, at 1278 (internal citations and quotes omitted).

51. *Id.* at 1281.

52. *See* Johnson, *supra* note 49, at 928.

53. *Id.*

safety justification did not satisfy the Fifth Circuit.[54] The Fifth Circuit focused on the fact that the rule was published seven months after SORNA's enactment, deciding that the delay indicated that the Attorney General was not responding to an emergency.[55] Additionally, it questioned the Attorney General's assertion that the rule was necessary to protect public safety. The Fifth Circuit decided that the mechanics of the rule did not result in information sharing with local authorities and that local authorities were sufficiently equipped to prosecute the sex offenders before the rule's promulgation.[56] In applying what appeared to be rather different versions of the "arbitrary and capricious standard," the Fifth and Eleventh Circuit split on SORNA demonstrates that a court's stated choice of legal standard for "good cause" determinations will not always indicate the outcome.[57]

B. Common Uses

By statute, the APA allows agencies to forgo notice-and-comment if conducting those procedures would be "impracticable, unnecessary, or contrary to the public interest."[58] In practice, uses of the "good cause" exception can generally be divided into five categories: 1) when going through the notice-and-comment process would subvert the statutory scheme; 2) when the agency can clearly establish that Congress intended for it to forgo notice-and-comment; 3) when rules are technical or insignificant enough to make compliance unnecessary; 4) during presidential transitions; and, key to this article, 5) when the agency faces an urgent emergency or public safety threat.[59] This subsection demonstrates how courts have treated uses of the "good cause" exception under each of these categories.

1. When notice-and-comment would subvert a statutory scheme

Agencies have claimed "good cause" to avoid notice-and-comment procedures in instances where either procedure would run counter to the public interest; specifically, when it would "subvert the rule or underlying statute's purpose."[60] Because notice-and-comment procedures are

54. *See id.*
55. *See id.* at 929.
56. *See id.* at 928.
57. A similar split emerged from the circuits that evaluated the use of "good cause" *de novo*. *See* CRS Report, *supra* note 31, at 15.
58. 5 U.S.C. § 553(b)(3)(B) (2018).
59. *See* CRS REPORT, *supra* note 31, at 4-5.
60. *Id.* at 8.

generally considered to be aligned with the public interest,[61] this category of exceptions is exceedingly narrow. Courts have declared that the exception should be used only where the "announcement of a proposed rule would enable the sort of ... manipulation [that] the rule sought to prevent."[62]

Examples. A Temporary Emergency Appeals Court upheld the Department of Energy's (DoE)[63] invocation of the "good cause" exception when it issued price controls in response to the 1970s oil crisis.[64] The DoE's "good cause" justification was based on the fact that advance notice of such regulations would cause regulated entities to change their behavior in a way that would undermine the purpose of the regulations themselves.[65] The court deferred to the agency's contemporaneous predictive judgment that oil companies may massively increase prices if given advance notice of impending price freezes.[66]

In contrast, the D.C. Circuit struck down a Federal Energy Regulatory Commission (FERC) rule that required natural gas pipeline companies to give advance notice of new construction projects because it failed to properly justify its conclusory judgment that conducting notice-and-comment would encourage undesirable activity.[67] FERC gave two justifications for bypassing notice-and-comment: 1) the rule was temporary in nature because it was only in effect until a final rule could be enacted and 2) there could be environmental degredation if natural gas companies "rush[ed]" construction projects "to avoid the mandates of a final rule."[68] The court held that, while the fact that the rule was temporary could weigh in favor of "good cause," it alone could not justify using the exception because any agency could then use "good cause" to enact an IFR before a final rule took effect.[69] This, the Court warned, would allow the "good cause" exception to "swallow" the notice-and-comment

61. *See* NRDC v. Nat'l Highway Traffic Safety Admin., 894 F.3d 95, 114 (2d Cir. 2018).

62. Dialysis Patient Citizens v. Burwell, No. 4:17-CV-16, 2017 WL 365271, at *3 (E.D. Tex. 2017).

63. The Department of Energy was known as the Federal Energy Administration at the time.

64. CRS REPORT, *supra* note 31, at 8.

65. *See* Mobil Oil Corp. v. Dep't of Energy, 728 F.2d 1477, 1493 (Temp. Emer. Ct. App. 1983).

66. *Id.*

67. CRS REPORT, *supra* note 31, at 7.

68. Tenn. Gas Pipeline Co. v. FERC, 969 F..2d 1141, 1144 (D.C. Cir. 1992).

69. *See* CRS REPORT, *supra* note 31, at 7. It is possible that the decision in Little Sisters would change the outcome in this case, as the regulation upheld in that case underwent a similar procedure. *See* Little Sisters, *supra* note 20.

requirements.[70] The Court also rejected FERC's environmental degredation argument.[71] It held that, while forecasts of undesireable activity on the part of regulated entities was sometimes a valid reason for "good cause," that justification had to include "the basis for its prediction so that the reviewing court may be in a position to determine whether it acted reasonably."[72] FERC had relied only on its own prediction and did not provide evidence in the record to back up that speculation.[73]

2. When congressional intent supports forgoing notice-and-comment

Courts occasionally permit agency "good cause" determinations when Congress waives the requirement directly or when it waives the requirement implicitly by imposing statutory deadlines that would make it impossible for the agency to comply if the regulation was issued using regular notice-and-comment procedures.

Congress recently granted the Department of Labor (DOL) permission to waive notice-and-comment rulemaking in the text of the Families First Coronavirus Response Act (FFCRA).[74] Among other provisions, the statute granted the Secretary of Labor the "authority to issue regulations for good cause under sections 553(b)(B) and 553(d)(A)" of the APA "as necessary, to carry out the purposes of this Act."[75] The DOL used this authority to issue implementing regulations, including one establishing emergency paid sick leave.[76]

Even when Congress does not directly allow an agency to use "good cause," courts have upheld agencies' use of the "good cause" exception if a congressionally established timeline is very strict[77] or if delay in

70. CRS REPORT, *supra* note 31, at 7, 9.

71. *See id.* at 9.

72. Michael A. Rosenhouse, *Construction and Application of Good Cause Exception to Notice and Comment Rulemaking Under Administrative Procedure Act (APA), 5 U.S.C.A. § 553(b)(B),* 26 A.L.R. Fed. 2d 97 (2008).

73. *See id.*

74. Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 3102, 5111, 134 Stat. 178, 189, 201 (2020).

75. *Id.* § 5111.

76. Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326 (Apr. 6, 2020) (to be codified at 29 C.F.R. pt. 826).

77. *See* Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877, 884, n.7, 885 (3d Cir. 1982) (agreeing that a 49-day congressionally-mandated deadline permitted the Department of Health and Human Services to claim a "good cause" exception and skip notice-and-comment).

Applicant Details

First Name	**Sarah**
Last Name	**Shor**
Citizenship Status	**U. S. Citizen**
Email Address	**sarah.shor@student.american.edu**
Address	**Address** **Street** **425 L St NW, Apt 430** **City** **WASHINGTON** **State/Territory** **District of Columbia** **Zip** **20001** **Country** **United States**
Contact Phone Number	**2142329513**

Applicant Education

BA/BS From	**University of Georgia**
Date of BA/BS	**May 2017**
JD/LLB From	**American University, Washington College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010**
Date of JD/LLB	**May 1, 2022**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**American University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Death Penalty, Prison Litigation**

Recommenders

Andrew, Feguson
ferguson@wcl.american.edu
Davis, Angela J.
angelad@wcl.american.edu
(202) 274-4230

This applicant has certified that all data entered in this profile and any application documents are true and correct.

SARAH SHOR

425 L Street, NW | Washington, DC 20001 | (214) 232-9513 | sarah.shor@student.american.edu

June 12, 2021

The Honorable Elizabeth W. Hanes
United States District Court for the Eastern District of Virginia
701 East Broad Street, Suite 6112
Richmond, VA 23219-3528

Dear Judge Hanes:

I am a third-year law student at American University Washington College of Law and I am writing to express my strong interest in a clerkship in your chambers for the 2022-24 term. I believe my successful record of academic achievement during law school, my work experience, and my legal research and writing skills have prepared me to assist you in chambers as your clerk. I was born in the area and still have family in Virginia, and I look forward to the opportunity to provide my services as a judicial clerk in this legal community.

In addition to my academic achievement and demonstrated legal writing and research skills as evidenced by my enclosed resume, I also bring a committed work ethic. Prior to law school, I received a dual-master's degree in Social Work and Criminal Justice from the University of Pennsylvania. While in law school, I received substantive legal writing experience while I was a judicial intern for the Honorable J. Michael Ryan on the D.C. Superior Court. My experience researching, writing, and observing the law in action in Judge Ryan's chambers crystallized my desire to serve as a judicial clerk after graduation. In addition, I am current the Senior Symposium Editor of the *American University Law Review* where I have significant editing, drafting, and Bluebooking experience. My other legal experience as an intern in the Maryland Office of the Public Defender and the D.C. Public Defender Service provided me with substantive legal research and writing experience, drafting internal memoranda, plea negotiations, and motions for the respective trial courts. I am in the top 10% of my class and I received the highest grade designation in my first year Civil Procedure course. It is my strong record of achievement, experience, and skills that will be especially beneficial for a clerkship in your chambers, and I look forward to the opportunity to assist you while learning about procedure and practice from your point of view as a prior federal public defender serving on the District Court for the Eastern District of Virginia.

Thank you in advance for your consideration. I am available at your convenience to discuss this opportunity further. Please do not hesitate to contact me should you have any questions or require additional documentation.

Truly yours,

Sarah Shor

SARAH SHOR

425 L Street, NW | Washington, DC 20001 | (214) 232-9513 | sarah.shor@student.american.edu

EDUCATION

American University Washington College of Law, Washington, DC
Juris Doctor candidate, May 2022; GPA 3.8 (Top 10%)

Honors: Public Interest Public Service Scholar (full tuition merit scholarship); Legal Rhetoric Certificate of Excellence (Fall 2019); Highest Grade Designation in Civil Procedure (Fall 2019)

Activities: *American University Law Review* Senior Symposium Editor (2021-22), Junior Staffer (2020-21); Research with Professor Brent Newton (Summer 2021); Criminal Justice Clinic (Fall 2021); Equal Justice Foundation, Board Member (2020-21); Juvenile Justice Society; Criminal Law Society

The University of Pennsylvania, Philadelphia, PA May 2019
Master of Social Work, Master of Science in Criminology; GPA 3.9

The University of Georgia, Athens, GA May 2017
Bachelor of Social Work, Bachelor of Arts in Criminal Justice; GPA 3.7; *magna cum laude*

PROFESSIONAL EXPERIENCE

Office of Capital and Forensic Writs, Austin, TX
Legal Intern May 2021 – Present

- Assist attorneys, mitigation specialists, and investigators in preparing to file an application of habeas corpus
- Conduct substantial legal research on constitutional violations that occurred at trial

Public Defender Service for the District of Columbia, Special Litigation Division, Washington, D.C.
Legal Intern January 2021 – May 2021

- Researched legal issues relating to systemic litigation efforts, such as sentencing, venue, and habeas corpus
- Interviewed clients, family members, and other stakeholders to draft compassionate release motions and motions for release under the Incarceration Reduction Amendment Act

Chambers of the Honorable J. Michael Ryan, D.C. Superior Court, Washington, D.C.
Legal Intern August 2020 – December 2020

- Draft and edit post-conviction memoranda and orders to present to the court
- Conduct legal research on issues including ineffective assistance of counsel, actual innocence, and newly discovered evidence

American University Washington College of Law, Washington, D.C.
Legal Rhetoric Deans Fellow August 2020 – May 2021

- Teach Bluebook citation and legal writing strategies to first year students
- Provide assistance to students as they develop open and closed memoranda, and trial court and appellate briefs

Maryland Office of the Public Defender, Juvenile Division, Baltimore, MD
Law Clerk June 2020 – August 2020

- Drafted and edited motions, memorandums, emails, and plea negotiations
- Conducted legal research on a wide variety of legal issues, such as double jeopardy, suppression of confessions, inducements, and *Miranda* rights
- Connected with youth and their caretakers to answer questions and serve as a liaison for them and the attorney

National Juvenile Defender Center, Washington, D.C.
Policy and Research Intern June 2019 – August 2019

- Analyzed data from state assessments on juvenile defender systems and crafted points for future publications
- Researched applicable law about juvenile defense systems for interviews with stakeholders

Youth Advocacy Project, Philadelphia, PA
Direct Service Fellow September 2018 – May 2019

- Partnered with youth, their families, and attorneys to develop a mitigation report
- Supported youth prosecuted in the adult criminal justice system by providing comprehensive support before, during, and after incarceration

The Goldring Reentry Initiative, Philadelphia, PA
Graduate Social Work Intern July 2018 – May 2019

- Conducted a thorough biopsychosocial assessment and developed a comprehensive reentry plan for reentry
- Worked with a former juvenile lifer to conduct a needs assessment of the population

Peace Place, Inc., Winder, GA
Undergraduate Social Work Intern August 2016 – May 2017

- Planned and facilitated weekly support groups for survivors of domestic violence and their children
- Accompanied and supported survivors in court, along with their attorneys

National Center for Missing and Exploited Children, Washington, DC
Case Management Intern June 2016 – August 2016

- Served as a liaison between law enforcement, families and the Center to find missing children

US Department of Justice, Civil Rights Division, Disability Rights Section, Washington, DC
Undergraduate Intern January 2016 – May 2016

- Drafted, reviewed, and analyzed three EEOC files and made suggestions for Department action
- Assisted in the investigation of six allegations of Americans with Disabilities Act violations

VOLUNTEER EXPERIENCE

- **WCL Juvenile Justice Society,** *Mentor at Cheltenham Youth Detention Center*, MD (January – March 2020); *Mentor at TraRon Center*, Washington D.C. (November 2019)
- **The Petey Greene Program,** *Tutor and Mentor at Glen Mills School,* Philadelphia, PA (January – August 2018)

SHOR SARAH F 3735232 04/02

05/30/21 1 OF 1

FALL 2019

LAW-501	CIVIL PROCEDURE	04.00	A	16.00
LAW-504	CONTRACTS	04.00	B+	13.20
LAW-516	RESEARCH & WRITING I	02.00	A	08.00
LAW-522	TORTS	04.00	A	16.00

LAW SEM SUM: 14.00HRS ATT 14.00HRS ERND 53.20QP 3.80GPA

SPRING 2020

LAW-503	CONSTITUTIONAL LAW	04.00	P	00.00
LAW-507	CRIMINAL LAW	03.00	P	00.00
LAW-517	RESEARCH & WRITING II	02.00	P	00.00
LAW-518	PROPERTY	04.00	P	00.00
LAW-652	PUBLIC LAW	02.00	P	00.00

LAW SEM SUM: 15.00HRS ATT 15.00HRS ERND 0.00QP 0.00GPA

FALL 2020

LAW-508	CRIMINAL PROCEDURE I	03.00	A-	11.10
LAW-633	EVIDENCE	04.00	A	16.00
LAW-682	CRITICAL RACE THEORY	02.00	A	08.00
LAW-769	EXTERNSHIP SEMINAR			
	SUPERVISED EXTERNSHIP SEMINAR	02.00	A	08.00
LAW-795CT	SECTION 1983 LITIGATION	03.00	A	12.00
LAW-899	EXTERNSHIP FIELDWORK	02.00	P	00.00

LAW SEM SUM: 16.00HRS ATT 16.00HRS ERND 55.10QP 3.93GPA

SPRING 2021

LAW-628	CRIMINAL PROCEDURE II	03.00	A-	11.10
LAW-643	FEDERAL COURTS	04.00	A-	14.80
LAW-769	EXTERNSHIP SEMINAR			
	ADVANCED EXTERNSHIP SEMINAR	01.00	P	00.00
LAW-796S	LAW REVIEW I	02.00	--	--.--
LAW-899	EXTERNSHIP FIELDWORK			
	SUPERVISED EXTERNSHP FIELDWORK	03.00	P	00.00

LAW SEM SUM: 13.00HRS ATT 11.00HRS ERND 25.90QP 3.70GPA

SUMMER 2021

LAW-799	LEGAL RESEARCH PROJECT	01.00	--	--.--

FALL 2021

LAW-638A	JUVENILE JUSTICE	03.00	--	--.--
LAW-756	CRIM JUSTICE DEF CLINIC SEM	03.00	--	--.--
LAW-761	CRIM JUSTICE DEFENSE CLINIC	04.00	--	--.--
LAW-796F	LAW REVIEW I	02.00	--	--.--
LAW-992	CRIMINAL JUSTICE ETHICS	03.00	--	--.--

LAW CUM SUM: 58.00HRS ATT 56.00HRS ERND 134.20QP 3.83GPA

END OF TRANSCRIPT

June 12, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend Ms. Sarah Shor to be a law clerk in your chambers. She will be terrific. Ms. Shor possesses all of the academic, intellectual, and professional skills necessary to succeed as a law clerk, and a depth and passion for the puzzles of the law that will make her a joy to work with on a daily basis. I recommend her without reservation.

Ms. Shor has excelled in law school. I taught her Evidence and know she has the academic and analytical talents necessary to be a great law clerk. She was an active and thoughtful participant in class, did great on my assessments, and was a pleasure to teach. Such academic success is unsurprising because she has done exceedingly well throughout law school. She received the highest grade in Civil Procedure as a 1L, was given the Legal Rhetoric Certificate of Excellence, and has just constantly done well as a student of the law. More importantly – and I say this with respect – she is a "procedure nerd" who loves the intricacies of procedure and codified rules. Listening to her talk about the joys of working on habeas cases, or studying Fed Courts or section 1983 law shows that she is exactly the type of law clerk who will go deep in the weeds to learn and solve the puzzles of law. There really are not that many law students who love procedural and doctrinal puzzles like Ms. Shor, so when you can find one, it is really valuable.

Beyond classes, Ms. Shor has all of the research, writing, editing, and blue-booking skills necessary to do well as a law clerk. She is on the American University Law Review, has taught Legal Rhetoric to 1Ls, and has worked on numerous research projects where she has been required to write, research, edit, and bluebook. She is currently co-chairing the "write-on" competition for all law journals and I have worked with her in the planning of that labor intensive process. Simply stated, I have no doubt that Ms. Shor will hit the ground running as a law clerk with all of the requisite skills necessary to succeed and be able to add value immediately.

Ms. Shor came to law school after obtaining her Masters Degree in Social Work at Penn. Her studies on macro social work issues translated well into her desire to think systemically about legal problems impacting disadvantaged communities. In fact, much of her legal studies have focused on working with those impacted by poverty, developmental disabilities, and the criminal justice system. She brings to her studies a rich multi-disciplinary approach, an empathy grounded in lived experience, and a helpful perspective about the law. Her insights about the law from the perspective of social work really enriched our classes and will ground her work as a law clerk.

Ms. Shor's professional experience builds off this social work background. She has worked for a series of legal service providers focused on criminal and juvenile justice issues. Over the summers and through internships, she has worked on compassionate release cases, habeas petitions, criminal law, and juvenile justice policy initiatives. She has been given challenging assignments with significant autonomy because she is such a competent and responsible student.

Most relevantly to her desire to clerk, Ms. Shor worked as a judicial intern for Judge Michael Ryan at the D.C. Superior Court. It was, by all accounts, a terrific experience that solidified her intent to clerk upon graduation. Working with Judge Ryan and seeing the day-to-day work of a law clerk convinced Ms. Shor that she wanted to clerk after graduating. She has already seen the work to be done as a law clerk and is excited to contribute her legal skills in that way.

Equally important, Ms. Shor is a pleasure to work with – upbeat, responsible, organized, and creative. She improves things and gets things done. She has been a leader in the law school community taking on positions on the law review, the Equal Justice Foundation, and the Juvenile Justice, and Criminal Law Societies. She has dedicated her legal career to working with underserved populations and using her legal skills to improve the lives of others.

In short, Ms. Shor possesses all the academic and experiential skills necessary to not just succeed, but thrive as a law clerk. She is exactly the type of law student I would want to hire as a law clerk and will be a real benefit to chambers.

Please feel free to reach out if you have any questions or concerns.

Sincerely,

Feguson Andrew - ferguson@wcl.american.edu

Agf
Andrew Guthrie Ferguson
Professor of Law

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write in strong support of Sarah Shor's application to serve as your judicial law clerk beginning in the fall of 2022. I give Sarah my highest recommendation.

I am a law professor at American University Washington College of Law ("WCL") where I teach Criminal Law, Criminal Procedure, and related courses. I first met Sarah when she started law school in the fall of 2019. Sarah was a recipient of one of WCL's most prestigious scholarships – the Public Interest Public Service ("PIPS") Scholarship. These three-year, full-tuition scholarships are awarded to students with strong academic credentials who are committed to pursuing a public interest or public service career upon graduation. All PIPS Scholars are assigned a faculty mentor, and I was assigned to mentor Sarah because of her interest in juvenile and criminal justice. I have met regularly with Sarah since she started law school to discuss her career goals and a variety of issues related to juvenile and criminal justice. Sarah also was enrolled in my Criminal Procedure class. She did very well in the class, earning an "A-" as her final grade.

I was delighted to hear of Sarah's interest in pursuing a judicial clerkship. I have no doubt that her academic, extracurricular, and employment experiences have prepared her to be an outstanding law clerk. Sarah has excelled in all of her classes and is a member of the American University Law Review. She received the Highest Grade Designation in Civil Procedure and the Legal Rhetoric Certificate of Excellence. She currently serves as a Legal Rhetoric Dean's Fellow and has served as a law clerk at the Public Defender Service for the District of Columbia and at the Maryland Office of the Public Defender. Sarah also served as a judicial intern for the Honorable Michael Ryan of the District of Columbia Superior Court.

Sarah is very bright, hardworking, and reliable. She is also mature, thoughtful and considerate towards others. I have no doubt that she would work well with members of the bench, bar, and general public.

In sum, I give Sarah Shor my highest recommendation without any reservations. If I may be of any further assistance, please feel free to contact me at angelad@wcl.american.edu or 202-274-4230.

Thank you for your consideration of these views.

Sincerely,

Angela J. Davis
Distinguished Professor of Law

COVER SHEET FOR WRITING SAMPLE

The following appellate brief was the culminating assignment for the Legal Rhetoric: Research and Writing course at American University Washington College of Law. Legal Rhetoric is a four-credit, year-long course that covers legal research, writing, analysis, citations, and oral advocacy.

This excerpt of the appellate brief omits the Caption, Table of Contents, Table of Authorities, Statement of the Issues, Statement of Jurisdiction, Statement of the Case, Summary of the Argument, and the first argument, which my partner wrote. I omitted the other aspects of the brief because those were sections that my partner and I worked on together and would not be an adequate representation of my own independent work.

This excerpt of the brief addresses two separate legal questions regarding the Fourth Amendment and the plain view exception to the warrant requirement. The first issue discusses the bounds of what a search is under the Fourth Amendment and whether an individual has a privacy interest in a garage door opener and subsequently his address. The second issue discusses the plain view doctrine in detail and what is necessary for it to apply.

The relevant facts are as follows:

Law enforcement saw the defendant, Ron Mitchell, enter a motel room with a girl whom the officer suspected was a victim of child sex trafficking. In accordance with a local ordinance, law enforcement entered the motel room and arrested Mitchell. After arresting Mitchell, officers sought to identify where he lived using a garage door opener that they seized upon arrest. The officers began activating the garage door opener while driving around Mitchell's neighborhood and were able to identify Mitchell's home when a garage door began to open. One of the officers pressed the button on the garage door opener as soon as the garage door began to open, but the door fully opened before it began to close, which was the standard process of the garage door model. During the twenty seconds that the door was open, the officers observed two guns on the floor, which appeared sawed-off, and a triple beam scale, an item traditionally used in narcotics distribution. Having identified potentially illegal objects, the officers reopened the garage door and measured the guns, confirming that one was an illegal sawed-off shotgun. The officer seized the shotgun and the scale.

The District Court denied Mitchell's Motion to Suppress the evidence seized in his garage and in the motel room. This brief will only address the articles seized in the garage and will be written from the perspective of the United States government.

I. The district court correctly denied the Motion to Suppress because the use of the garage opener to confirm Appellant's address is not a search and, if it is a search, the subsequent seizure of the weapons and drug paraphernalia that the officers could see in the garage is constitutional.

The purpose of the Fourth Amendment is to protect the privacy of individuals, not property, from an unjustified violation by the government. See Camara v. Municipal Court of San Francisco, 387 U.S. 523, 528 (1967). In determining whether a search has occurred, the Supreme Court uses both the property-based trespass approach and one based on an expectation of privacy—the relevant test in this case is whether Appellant had a reasonable expectation of privacy. See Byrd v. United States, 138 S. Ct. 1518, 1526 (2018) (using the privacy analysis and the trespass analysis in conjunction); Florida v. Jardines, 569 U.S. 1, 5 (2013). It could not be deemed a search when the officer used the garage opener because the officer was merely confirming Appellant's address and Appellant had no reasonable privacy interest in that information, the garage opener, or the garage door. See United States v. Salgado, 250 F.3d 438, 456-57 (6th Cir. 2001); United States v. Correa, 908 F.3d 208, 217-18 (7th Cir. 2018); United States v. Lyons, 898 F.2d 210, 213 (1st Cir. 1990); State v. Barry, 617 P.2d 873, 875 (Ct. App. Nm. 1980). However, even if the court finds that the use of the garage opener was a search, it was a reasonable search that is not protected by the Fourth Amendment as there was no reasonable privacy interest or the privacy interest was so minimal that it was not necessary to obtain a search warrant. See United States v. Concepcion, 742 F.2d 1170, 1172-72 (7th Cir. 1991); Lyons, 898 F.2d at 212.

The plain view exception is an exception to the Fourth Amendment's warrant requirement. See Horton v. California, 496 U.S. 128, 133 (1990). If an article is in plain view, then neither its observation nor seizure would involve an invasion of privacy under the warrant requirement. Id. Officers must be in the location lawfully and have a right of access to the object,

and the object's incriminating character must be immediately apparent. See Coolidge v. New Hampshire, 403 U.S. 443, 465-68, 470 (1971). The officer in this case was lawfully at the garage because using the garage opener was either not a search or was a search not qualifying for constitutional protection. Appellant has not appealed whether the officer had a lawful right of access to the seized objects. Finally, both the guns and the scale had an immediately apparent incriminating nature because the intrinsic nature of the objects gave officers probable cause to believe they were associated with criminality. See Texas v. Brown, 460 U.S. 730, 746 (1983); United States v. McLevain, 310 F.3d 434, 442-43 (6th Cir. 2002); United States v. Beal, 810 F.2d 574, 576-77 (6th Cir. 1987); United States v. Szymkowiak, 727 F.2d 95, 99 (6th Cir. 1984); United States v. Truitt, 521 F.2d 1174, 1176-77 (6th Cir. 1975). Accordingly, the United States respectfully requests that the district court's decision be affirmed.

A. The use of the garage opener is not a search because the opener was used only to confirm Appellant's address and Appellant has no reasonable expectation of privacy; if the court finds a search, the search does not qualify for Fourth Amendment protection because Appellant has little or no privacy interest in the garage opener, therefore officers do not need to obtain a search warrant.

Using a garage opener to confirm the Appellant's address does not constitute a search under the Fourth Amendment. See Salgado, 250 F.3d at 456-57; United States v. DeBardeleben, 740 F.2d 440, 442 (6th Cir. 1984); Correa, 908 F.3d at 217-18; Lyons, 898 F.2d at 213; Barry, 617 P.2d at 875. Even if a search has occurred, the search will not be protected under the Fourth Amendment because Appellant has no privacy interest in the garage opener or information obtained from the garage, or his privacy interest is so minimal that obtaining a warrant is unnecessary. See Concepcion, 742 F.2d at 1172-73; Lyons, 898 F.2d at 213.

A search has not occurred when the officer is confirming the address or identity of a suspect under the Fourth Amendment. See Salgado, 250 F.3d at 456-57; Correa, 908 F.3d at 217-18; Lyons, 898 F.2d at 213; Barry, 617 P.2d at 875. In Correa, officers stopped a vehicle for

suspected involvement in drug trafficking and subsequently used a garage opener found on the suspect to locate his home. 908 F.3d at 212. The agent's use of the garage opener to find the suspect's home was not a search of the garage, rather just a search of the garage opener, and the agent used the opener to confirm the address of the suspect. Id. at 217-18. In Barry, officers seized a garage opener upon arrest and used the opener to confirm the suspect's address. 617 P.2d at 874. Here, the court held that the suspect's constitutional rights were not violated because he had no expectation of privacy in the entryway to his garage and officers used the opener solely for confirming his address. Id. at 875.

Similarly, in Salgado, officers found a key inside a car suspected to have transported cocaine. 250 F3d at 446. The officers used the key to confirm the suspect's residence to tie him to the conspiracy. Id. The court held that the mere insertion of a key into a lock is not a search when the officer lawfully possesses the key, is in a location he has a right to be in, and uses the key to determine whether it operates the lock: there is no unfair evidence gained by inserting a key into an apartment door when the purpose is simply to confirm that the key fits the lock. Id. at 456-67. See also DeBardeleben, 740 F.2d at 442 (holding that inserting a key into a vehicle door did not constitute a search because the insertion was minimally intrusive and justified by the intent to confirm the suspect's car). In Lyons, officers obtained padlock keys and information on a storage container upon arrest and inserted the keys into the storage container when they located it. 898 F.2d at 212. The court held that the insertion of a key into a lock for the sole purpose of identifying the owner does not constitute a search under the Fourth Amendment. Id.

When a search has occurred, the Fourth Amendment does not protect a suspect when he has no privacy interest in the object seized or the information obtained by using the object, or when his privacy interest is so minimal that obtaining a search warrant is unnecessary.

Concepcion, 742 F.2d at 1172-73; Lyons, 898 F.2d at 212. In Concepcion, officers confirmed a suspect's address by testing a set of keys on a mailbox in an apartment common area. 942 F.2d at 1171. The court held that there was a search because a keyhole provides information on who has access to the space beyond the lock, but that the minimal privacy interest made a search warrant unnecessary because the information produced by the search was just who lived beyond the door, which could have been determined by other means and was therefore not invasive. See id. at 1172-73. See also Correa, 908 F.3d at 218 (holding that the search was reasonable because there was no privacy interest in the garage openers themselves or the information they provided). Finally, in Lyons, where officers used a key to confirm that a storage container belonged to the suspect, the court held that the action was not a search, and even if it was a search, it would have been reasonable as there was no expectation of privacy in the padlock. 898 F.2d at 212.

In the present case, the use of the garage opener was not a search because officers used the opener solely to confirm Appellant's address and Appellant did not have a reasonable expectation of privacy in the garage opener or the door itself. This issue is on point with the issues in Correa and Barry, where it was not a search in either case to use a garage opener to confirm the suspect's residence as the only information gained by using the opener was an address. 908 F.3d at 217-18; 617 P.2d at 875. Salgado, Debardeleben, and Lyons support this point in parallel, as the courts held that inserting a key into a lock does not constitute a search. These holdings support the conclusion that using the garage opener solely to confirm Appellant's address was not a search as the Appellant's Fourth Amendment rights were not violated. 250 F.3d at 456-57; 740 F.2d at 445; 898 F.2d at 212.

If the court were to conclude that using Appellant's garage opener was a search, the court would likely also hold that the search was not protected by the Fourth Amendment because there

is little or no expectation of privacy in the information collected by using the garage opener to confirm his address. Appellant's case would be identical to Correa, where the court held that using the openers was a search but that it was a reasonable search because there was no privacy interest in the openers or the information they revealed. 908 F.3d at 217-19. Appellant may argue that the Correa court held there was a search of the garage, but the court explicitly said that only the opener was searched and that the suspect did not have a reasonable expectation of privacy in the opener. Id. At 217-18. Appellant's case is also similar to Concepcion and Lyons as to the information gathered, and the method of obtaining the information was so non-intrusive that it renders the search reasonable without Fourth Amendment protections. 742 F.2d at 1172-72; 898 F.2d at 212. In Appellant's case, the information gathered from the possible search was just the confirmation of Appellant's address, which officers could have gathered from other means, therefore rendering the "search" not intrusive enough to trigger Fourth Amendment protections.

B. Because opening the garage is not a search, and it is a reasonable search if it is a search, the plain view doctrine allows the officers to seize the weapons and drug paraphernalia seen in the garage because of the items' incriminating character.

An object's incriminating nature is immediately apparent when officers are able to determine probable cause that the object is associated with criminality using facts known to them at the moment of discovery. See Brown, 460 U.S. at 746; McLevain, 310 F.3d at 442-43; Beal, 810 F.2d at 576-77; Szymkowiak, 727 F.2d at 99; Truitt, 521 F.2d at 1176-77.

For an object's criminality to be immediately apparent, the officers must, using the facts known to them at the moment of discovery, be able to determine probable cause that the object is associated with criminality. See McLevain, 310 F.3d at 442-43; Beal, 810 F.2d at 577; Szymkowiak, 727 F.2d at 99; Truitt, 521 F.2d at 1176-77. In Brown, an officer discovered a suspicious knotted party balloon between the driver's fingers upon stopping him for a routine license check. 460 U.S. at 733. The court held that there is no innocence associated with a

knotted party balloon between one's fingers and that its drug-related criminality was immediately apparent to the officers based on prior experience and knowledge. Id. at 746. In Truitt, officers discovered a sawed-off shotgun in plain view while executing a search warrant. 521 F.2d at 1175. The court concluded that the criminality of the sawed-off shotgun was both immediate and apparent based on the intrinsic criminal nature of such a weapon. Id. at 1175-76; see also United States v. Carmack, 426 F. App'x 378, 382-83 (6th Cir. 2011) (upholding probable cause to believe that the incriminating nature of a sawed-off shotgun was immediately apparent); United States v. Wade, 30 F. App'x 368, 372 (6th Cir. 2002) (stating that the "intrinsically incriminating characteristic of a sawed-off shotgun is the length of the barrel").

Conversely, Szymkowiak involved two weapons that were seized during a warranted search for jewelry. 727 F.2d at 97. The immediacy element was not met here because at the time of discovery, there was no way to determine whether the possession of the firearms was unlawful, as mere possession was not necessarily criminal. Id. at 99; see also United States v. Gray, 484 F.2d 352, 355 (6th Cir. 1973) (holding a rifle seizure unconstitutional where it is not immediately apparent that the weapon is associated with criminality).

In McLevain and Beal, the court did not find the objects' criminality immediately apparent because the character of each object could be explained by non-criminal uses. 310 F.3d at 442-43; 810 F.2d at 576-77. In McLevain, the officers seized a twist tie, cigarette filler, spoon with residue, and unlabeled pill bottle in the suspect's home. 310 F.3d at 438. While the agent believed the items to be drug paraphernalia, he could not have assumed the items were incriminating without further investigation—there were alternative, non-criminal uses for the objects. Id. at 442; see also United States. v. McLernon, 746 F.2d 1098, 1125 (6th Cir. 1984) (ruling that a notepad and calendar could not be discerned to associate with criminal activity).

Similarly, in Beal, officers searched a dresser under a valid search warrant and seized two pen guns. See 810 F.2d at 575. Without disassembling the pens, the officers could not immediately discern probable cause to associate the pen guns with criminal activity. See id. at 577.

In Appellant's case, the apparent criminality of both the guns and the triple-beam scale justified the officers' seizure of the items. The issue of the guns is on point with the controlling case of Truitt. Similar to both Truitt and Brown, the intrinsic criminal nature of the sawed-off gun found in Appellant's garage gives officers probable cause to believe that it was associated with criminality, as there is no innocence connected with a sawed-off gun. See 460 U.S. at 746; 521 F.2d at 1176-77. Appellant's case contrasts with Szymkowiak because the standard firearms there were not apparently criminal. See 727 F.2d at 99. However, in Appellant's case, one of the firearms was sawed-off, which is unlawful, indicating that criminality could be determined upon discovery. J.A. at 6. Finally, Appellant's case also differs from McLevain and Beal because the court reasoned that the objects in those cases were not intrinsically criminal, whereas an illegally altered firearm is obviously intrinsically criminal. See 310 F.3d at 442-43; 810 F.2d at 576-77.

The triple-beam scale's criminality was also immediately apparent to the seizing officers based on their experience and facts known about Appellant. Using the analysis in Beal, the officers had probable cause to believe that the scale had an incriminating nature based on the drugs that they found on the suspect in the motel room and knowing that a scale of that kind is used in narcotics distribution. See 810 F.2d at 577; J.A. at 5, 6. Appellant will argue that a triple-beam scale has non-criminal uses, similar to the cigarette filler or prescription bottle in McLevain or the pens in Beal. See 310 F.3d at 442-43; 810 F.2d at 576-77. However, the test in Brown does not require a certainty of criminality, but rather only that there is probable cause to *associate* the property with criminal activity. See 460 U.S. at 740-41 (emphasis added). The

triple-beam scale seized at Appellant's garage created probable cause, using the facts known to the officers at the time and within the twenty seconds in which they could see the object, to associate the property with criminal activity.

Applicant Details

First Name	**Ariel**
Middle Initial	**L**
Last Name	**Shuster**
Citizenship Status	**U. S. Citizen**
Email Address	**shusteal@mail.uc.edu**
Address	**Address** Street **803 Willard Street, Apt 02** City **Covington** State/Territory **Kentucky** Zip **41011** Country **United States**
Contact Phone Number	**3309624761**

Applicant Education

BA/BS From	**Miami University of Ohio**
Date of BA/BS	**May 2018**
JD/LLB From	**University of Cincinnati College of Law** **http://www.law.uc.edu/**
Date of JD/LLB	**May 15, 2021**
Class Rank	**25%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Veterans Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Gallagher, Kate
Kate_Gallagher@ca6.uscourts.gov
(513) 564-7056
Kessler, Zach
Zach.Kessler@usdoj.gov
Castro, Margaret
margaret.castro@usdoj.gov

References

Ms. Mallorie Thomas, Esq.
Ohio Innocence Project
University of Cincinnati College of Law
P.O. Box 210040
Cincinnati, OH 45221
(513) 556-3474
thoma3ma@ucmail.uc.edu

Mr. Matthew Horwitz, Assistant United States Attorney
United States Attorneyâ€™s Office for the Southern District of Ohio
221 E 4th Street
Cincinnati, OH 45202
(513) 684-3711
matthew.horwtiz@usdoj.gov

Mrs. Kate Gallagher, Senior Motions Attorney
United States Court of Appeals for the Sixth Circuit
Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, Ohio 45202
(513) 564-7056
kate_gallagher@ca6.uscourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ariel Shuster

803 Willard St. Apt 02 Covington, Kentucky 41011 (330)-962-4761 shusteal@mail.uc.edu

August 24, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Honorable Judge Hanes:

I am a rising third-year law student at the University of Cincinnati College of Law applying for a clerkship position in your chambers for the 2021-2023 term. My passion for public service and the law has been evident since my time at Miami University. I drove from Oxford, Ohio to Cincinnati, Ohio multiple days a week to intern with the Ohio Innocence Project as an undergraduate student. Since then, my drive and desire to continue to serve the legal community has only grown.

My legal background has provided me with the knowledge and diverse experience that would make me an effective law clerk. As an Ohio Innocence Project fellow, I was able to draft an appeal to the Twelfth District Court of Appeals of Ohio relating to a denied motion for DNA testing. This experience provided invaluable exposure to the discovery process, transcript and docket review, and habeas corpus litigation. Additionally, my work researching and drafting motions for both civil and criminal U.S. Attorney's Office of the Southern District of Ohio provided me the opportunity to draft numerous reply briefs and memoranda on various research topics. This position also allowed me to gain experience in deposition preparation and drafting an entire motion for summary judgment, working on cases at every stage of civil litigation. These experiences would allow me to review dockets and analyze complicated case facts to produce a thorough draft opinion to your chambers effectively and efficiently.

Through my past legal experiences, I developed a deep appreciation for public service and work in the judiciary, which was only furthered by my time with the Sixth Circuit Court of Appeals. My position as an Appellate Legal Intern for the Sixth Circuit afforded me considerable practical experience and helped advance my legal research and writing skills through the drafting of memoranda and proposed orders on both civil and criminal law matters to present to a three-judge panel. I have worked on numerous pro se petitioner motions, cases with 28 U.S.C. § 2255 and § 2254 issues, motions to dismiss, motions for attorney's fees, motions to supplement and stays of removal. I will continue to work for the Sixth Circuit throughout my final year of law school, making me uniquely prepared to clerk in your chambers.

Balancing these positions alongside a full course load and participation on *University of Cincinnati Moot Court Honor Board* and *Trial Team* evinces my ability to handle a large workload and efficiently manage my time. It is for these reasons that I believe I would make a valuable contribution to your chambers. Thank you for your time and consideration.

Respectfully,

Ariel Shuster

Ariel Shuster

803 Willard St. Apt 02 Covington, Kentucky 41011 (330)-962-4761 shusteal@mail.uc.edu

EDUCATION

University of Cincinnati College of Law, Cincinnati, Ohio
Juris Doctor, expected May 2021
GPA: 3.593
Class Rank: 29/127

Federal Bar Association, *Member*
Honor Council, *Member*
University of Cincinnati College of Law Moot Court Team, *Rendigs Co-Director*
University of Cincinnati College of Law Trial Team, *Member*

Miami University, Oxford, Ohio
Bachelor of Arts, Sociology, Minors in Criminology and Classical Humanities, May 2018
GPA: 3.76, *cum laude*

Alpha Kappa Delta, Sociology Honorary Society, *President*
Disciplinary Board, *Student Justice*
Miami Mock Trial
Ohio Innocence Project - Undergraduate, *Founder and President*

PROFESSIONAL EXPERIENCE

United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio
Appellate Legal Intern, Motions Specialist, May 2020 - Present

- Reviewing motions with accompanying responses and replies, and appellate and lower court dockets.
- Researching legal issues presented and preparing memoranda and proposed orders making recommendations on each motion.

United States Attorney's Office for the Southern District of Ohio, Cincinnati, Ohio
Law Clerk, October 2019-May 2020

- Assisting both civil and criminal Assistant United States Attorneys in researching legal issues and preparing memoranda.
- Drafting motions such as a motion for summary judgment and responsive motions to defense counsel filings.

Ohio Innocence Project, University of Cincinnati School of Law, Cincinnati, Ohio
Fellow, May 2019-April 2020

- Performing legal research and preparing briefs for clients in order to apply for DNA testing.
- Engaging directly with clients and assisting in the investigation into their claims of innocence.

University of Cincinnati College of Medicine, Cincinnati, Ohio
Research Assistant, May 2019-August 2019

- Conducting research alongside Professor James O'Reilly on the subject of addictions.
- Analyzing how addictions impact the legal system regarding custody, family court, and statutory regulations.

Summit County Prosecutor's Office, Akron, Ohio
Intern, May 2017-August 2017

- Assisting a prosecutor in preparing case materials, speaking with victims and witnesses, and attending pre-trial hearings in judges' chambers.

VOLUNTEER EXPERIENCE

Cincinnati Association for the Blind and Visually Impaired, Cincinnati, Ohio
Hamilton County Youth Court, Cincinnati, Ohio
Literacy Network of Greater Cincinnati, Cincinnati, Ohio

Ariel Shuster
University of Cincinnati College of Law
Cumulative GPA: 3.593

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure I	Professor Michael Solimine	A		
Constitutional Law I	Professor Christopher Bryant	A		
Contracts	Professor Jacob Cogan	B		
Lawyering I	Professor Nancy Oliver	B		
Torts	Professor Lee Black	B+		

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure II	Professor Elizabeth Lenhart	B+		
Consitutional Law II	Professor Kimberly Breedon	B+		
Criminal Law	Professor Mark Godsey	A-		
Lawyering II	Professor Michele Bradley	B+		
Property	Professor Yolanda Vasquez	B+		

Summer 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Summer Public Interest Fellowship	Attorney Mallorie Thomas	A		During this summer semester, I began my fellowship with the Ohio Innocence Project.

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Criminal Procedure II	Professor Mark Godsey	A		
Evidence	Profess Mark Godsey	A		
Innocence Project	Attorney Mallorie Thomas	A+		
Legal Ethics	Professor Mark VanderLaan	A-		
Moot Court Competition	Professor Christopher Bryant	HP		Moot Court is graded on a pass/fail scale.